(26,577)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 127.

DAVID GOLDSMITH, REBECCA LOTH, ESTHER I. GOLDSMITH, ET AL., PLAINTIFFS IN ERROR,

vs.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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1 UNITED STATES OF AMERICA,
State of Missouri, ss:

Be it remembered, that heretofore, to-wit, on the 25th day of September, 1911, there was filed in the office of the Clerk of the Supreme Court of the State of Missouri, in a cause between The George G. Prendergast Construction Company, plaintiff and respondent, and David Goldsmith, Rebecca Loth, Esther I. Goldsmith, Amelia Goldsmith and Rose Goldsmith, defendants and appellants, a certified transcript of the judgment of the Circuit Court of the City of St. Louis in said cause, and of the order allowing an appeal from said judgment to the Supreme Court of the State of Missouri, which said certified transcript of said judgment and of said order allowing an appeal is in words and figures as follows, to-wit:

2 STATE OF MISSOURI,
City of St. Louis, ss:

Be it remembered, that heretofore, to-wit: at the April Term, Nineteen Hundred and Eleven, of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, and on the Third day of April, 1911 it being the first day of the said April Term, 1911, of said Court, the following proceedings were had in cause No. 63633, Series A, of the causes in said Court, wherein the George G. Prendergast Construction Company, is plaintiff, and David Goldsmith, Rebecca Loth, Esther I. Goldsmith, Amelia Goldsmith and Rose Goldsmith are defendants, to-wit:

Monday, April 3rd, 1911.

66633-A.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY

VS.

DAVID GOLDSMITH, REBECCA LOTH, ESTHER I. GOLDSMITH, AMELIA GOLDSMITH, ROSE GOLDSMITH.

Now at this day this cause coming on for hearing, come the parties, plaintiff and defendants, by their respective attorneys, and a jury having heretofore been waived, said parties submit this cause to the Court upon the pleadings, the evidence and the proof adduced, and the special tax bill upon which this action is founded.

The Court having heard and duly considered the same, being fully advised of and concerning the premises, doth find in favor of the plaintiff on the issues joined, and doth find, adjudge and determine that plaintiff is entitled to recover the sum of Thirteen Hundred and

Ninety-Four 83/100 ($1394.83) Dollars on account of the
3 said special tax bill in plaintiff's petition described, being tax bill #609 dated on the 23rd day of February, 1910, and issued by the proper officers of the City of St. Louis, and being for work done in constructing sewers in Manchester Road Sewer District No. 3 under authority of Ordinance Nos. 21974 and 21975; and the Court doth further find, adjudge and determine that said special tax bill is a lien upon the realty in the petition described as follows to-wit:

A certain lot of ground having an aggregate front of Four Hundred and eighty-six and Four One Hundreths (486.04) feet on the West line of Kingshighway Boulevard, and more particularly described in Volume 1 page 35 (now 45) of the records of the Assessor of special taxes of the City of St. Louis, and on special tax bill referred to above, as follows, to-wit: in United States Survey 2037, Vol. 1 page 45 (formerly 35) beginning at the intersection of the West line of Kingshighway Boulevard and of the South line of the proposed Bischoff Avenue Sixty (60) feet wide, thence Westwardly along the South line of proposed Bischoff Avenue, sixty (60) feet wide to a point One Hundred and Seventy One (171) feet West of the Western line of Kingshighway Boulevard, thence Southwardly parallel with and One Hundred and Seventy One (171) feet West of the Western line of Kingshighway Boulevard, Five Hundred and Sixty Three and Eighty Nine One Hundredths (563.89) Feet to the North line of Old Manchester Road, thence North Eastwardly along the North line of Old Manchester Road, One Hundred and Eighty Nine and Forty Six One Hundredths (189.46) Feet to the West line of Kingshighway Boulevard, thence Northwardly along the Western line of Kingshighway Boulevard, Four Hundred and Eighty Six and Four Hundredths (486.04) Feet to the place of beginning; bounded
4 North by proposed Bischoff Avenue, East by Kingshighway Boulevard, South by Old Manchester Road, West by Goldsmith, et al.

The Court doth further find, adjudge and determine that said special tax bill together with interest thereon and the costs herein remain due and unpaid, and that plaintiff is entitled to enforce and foreclose the lien thereof. It is therefore now ordered, adjudged and decreed by the Court that plaintiff is entitled to have and to recover the said sum of Thirteen Hundred and Ninety Four 83/100 ($1394.83) Dollars upon said special tax bill, and is also entitled to the enforcement of the lien thereof against the realty aforesaid, and that the same be done by a sale, according to law, of said realty, and that whatever right, title, interest or estate defendants may have or hold in said realty be foreclosed and forever barred by the enforcement and foreclosure of the lien of said special tax bill, and it is further ordered by the Court adjudged and decreed that this judgment shall be and constitute a special judgment against the realty aforesaid in the said sum of Thirteen Hundred and Ninety Four 83/100 ($1394.83) Dollars, interest and costs herein, and that payment thereof shall be enforced according to law and that plaintiff have special execution thereof.

Finding of facts, conclusions of law, and instructions filed.

And at the said April Term, 1911, of said Court, the following further proceedings were had in said cause, to-wit:

5 66633-A.

THE GEORGE PRENDERGAST CONSTRUCTION COMPANY
vs.
DAVID GOLDSMITH, REBECCA LOTH, ESTHER I. GOLDSMITH, AMELIA GOLDSMITH.

Saturday, June 3rd, 1911.

Come now the defendants by attorney and file herein and present to the Court and affidavit for appeal and an appeal bond conditioned according to law in the sum of Three Thousand ($3,000.00) Dollars with Nathan Bry and Jacob Loth as sureties, and upon application of said defendants it is ordered by the Court that said bond be approved, and that the same operate as a supersedeas bond herein, and that an appeal be and is hereby allowed said defendants to the Supreme Court of the State of Missouri from the judgment rendered herein.

STATE OF MISSOURI,
City of St. Louis, ss:

I, Chas. R. Graves, Clerk of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, do hereby certify, that the above and foregoing, contains a true, full and complete transcript of the judgment in the above entitled cause, showing the term, day of the term, month and year in which the same was rendered, and also, of the order granting an appeal in said cause, as fully as the same remain of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office, in the City of St. Louis, this 18th day of July, 1911.

[SEAL.] CHAS. R. GRAVES,
Clerk Circuit Court.

6 And thereafter, on the 12th day of March, 1914, the following further proceedings were had and entered of record in said cause, to-wit:

No. 16697.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY,
Respondent,
vs.
DAVID GOLDSMITH et al., Appellants.

Come now the said parties, by their attorneys, and file their stipulation as to tax bill herein.

Which said stipulation is in words and figures following, to-wit:

7 In the Supreme Court of the State of Missouri, Division No. 2, April Term, 1914.

No. 16697.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, Respondent,

vs.

DAVID GOLDSMITH, REBECCA LOTH, ESTHER I. GOLDSMITH, AMELIA GOLDSMITH and ROSE GOLDSMITH, Appellants.

Stipulation.

It is stipulated and agreed by and between the parties to the above entitled cause that, inasmuch as the special tax bill sued upon in said cause has been lost or mislaid, the same need not, nor need its purport, be set forth in the abstract of the record to be filed by the appellants, but that said special tax bill shall, if found, be produced at the hearing of this cause on request of either party or on request of the Court.

Dated St. Louis, Missouri, March 11th, 1914.

A. R. & HOWARD TAYLOR,
Attorneys for Respondent.
DAVID GOLDSMITH,
Attorney for Appellants.

8 And thereafter, on the 21st day of March, 1914, there was filed in the office of the Clerk of said Supreme Court the appellants' printed abstract of the record in said cause, which said abstract is in the words and figures following, to-wit:

In the Supreme Court of Missouri, Division No. 2, April Term, 1914.

No. 16697.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, Respondent,

vs.

DAVID GOLDSMITH, REBECCA LOTH, ESTHER I. GOLDSMITH, AMELIA GOLDSMITH and ROSE GOLDSMITH, Appellants.

Abstract for Appellants.

This action was instituted on the 20th day of June, 1910. The petition therein, omitting caption and signature, was as follows:

Petition.

The Plaintiff states that it is and was at all times herein stated, a corporation organized and existing under the laws of the State of Missouri.

Plaintiff further states that the defendants, David Goldsmith, Rebecca Loth, Esther I. Goldsmith, Amelia Goldsmith and Rose Goldsmith, are the owners of a certain lot of ground described
9 in Special Tax Bill hereinafter mentioned, having an aggregate front of four hundred and eighty-six and 04/100ths (486.04) feet on the west line of Kingshighway Boulevard, and more particularly described in Vol. 1, page 35 (now 45) of the records of the Assessor of Special Taxes of the City of St. Louis and on Special Tax Bill referred to above, as follows, to-wit:

In U. S. Survey 2037, Vol 1, page 45 (formerly 35) beginning at the intersection of the West line of Kingshighway Blvd., and the south line of proposed Bischoff Avenue sixty feet wide (60), to a point one hundred and seventy-one feet (171) west of the west line of Kingshighway Blvd., thence southwardly parallel with and one hundred and seventy-one feet (171) west of the west line of Kingshighway Blvd., five hundred and sixty-three and 89/100ths feet (563.89) to the North line of Old Manchester Road, thence northeastwardly along the north line of Old Manchester Road one hundred and eighty-nine and 46/100ths feet (189.46) to the West line of Kings. highway Blvd., thence northwardly along the west line of Kingshighway Blvd., four hundred and eighty-six and 04/100ths feet (486.04) to the place of beginning, bounded North by proposed Bischoff Avenue, East by Kingshighway Blvd., South by Old Manchester Road, West by Goldsmith, et al.

Plaintiff further states that the city of St. Louis, Missouri, by its Ordinances numbers 21974 and 21975, duly passed and approved by its Municipal Assembly and the Mayor as required by the charter of said city, provided for the construction of sewers in the district duly so determined and called Manchester Road Sewer District, No. 3, in the city of St. Louis, and thereafter said city by its duly authorized officers and after proper advertisement as required by said charter, and ordinances, duly awarded the work of construct-
10 ing said sewers and let out the same by contract to the George G. Prendergast Construction Company aforesaid, and by virtue of the ordinances before named on the 20th day of May, 1905, said city duly entered into a contract with said The George G. Prendergast Construction Company, for the construction of the sewers aforesaid, which contract was numbered 7189.

Plaintiff says that thereafter said The George G. Prendergast Construction Company entered into the performance of the said contract and fully performed the same, constructing the aforesaid sewers, and that the same were duly accepted by said city and the cost thereof computed and duly assessed against the property in the said district. That the lot of ground hereinbefore described lies wholly within said district and that there was so assessed against David Goldsmith, Rebecca Loth, Joseph Goldsmith, Esther I. Goldsmith and Amelia Goldsmith and Rose Goldsmith, on said hereinbefore described property, by said city on account of the sewers aforesaid, the sum of Twelve Hundred and Ninety-seven Dollars and 60/100ths ($1297.60) for which amount said city issued to said contractors The George G. Prendergast Construction Company a special tax bill

numbered 609, dated February 23rd, 1910, herewith filed and marked Exhibit "A" duly signed by the President of the Board of Public Improvements of said City and countersigned by the comptroller of said city, and registered in Book 27, page 1, of the Register of Special Taxes, and in Vol. 27, page 224 of the Comptroller's Office of said city.

Plaintiff further states that the aforesaid special tax bill by virtue of the charter of the City of St. Louis, and the ordinances aforesaid, was duly divided into five equal parts, payable in installments, the first installment to become due in 30 days after notice of the issuance thereof was duly served, the second installment in one
11 year after said notice, the third installment in two years after said notice the fourth installment in three years after said notice and the fifth installment in four years after said notice, with interest at the rates provided by Sec. 25, Art. 6 of the Charter of the city of St. Louis.

Plaintiff further states that by virtue of the said ordinances and Sec. 25, Art. 6, of said city charter, The George G. Prendergast Construction Company is the lawful owner and holder of the special tax bill numbered 609, marked Exhibit "A" and herewith filed.

Plaintiff further states that at the request of the said The George G. Prendergast Construction Company on the 11th day of April, 1910, the defendant David Goldsmith was duly served with a notice of the issuance of the aforesaid special tax bill; on the 9th day of April, 1910, the defendant, Rebecca Loth was duly served with notice of the issuance of the aforesaid special tax bill; on the 11th day of April, 1910, the defendant Esther I. Goldsmith was duly served with notice of the issuance of the aforesaid special tax bill; on the 9th day of April, 1910, the defendant Amelia Goldsmith was duly served with notice of the issuance of the aforesaid special tax bill; on the 9th day of April, 1910, the defendant, Rose Goldsmith was duly served with notice of tthe issuance of the aforesaid special tax bill.

Plaintiff further states that said The George G. Prendergast Construction Company placed into the hands of the Marshal of the City of St. Louis the notice of the issuance of the above mentioned tax bill to be served upon Joseph Goldsmith, one of the parties named in said special tax bill, and that thereafter said Marshal after due and diligent search made a return of "Not Found" on said notice, on the 11th day of April, 1910.

Plaintiff further states that the first instalment of said
12 special tax bill although long since due and the interest upon the same has never been paid, but defendants have refused, and still refuse, to pay same.

Plaintiff further states that it is informed by the records of the Probate Court of the City of St. Louis that Joseph Goldsmith one of the parties named in said special tax bill, is now deceased, and that under his will David Goldsmith his brother, and defendant herein, is his sole devisee and as such owner of his interest in property therein described.

Plaintiff does hereupon by the filing of this suit exercise its op-

tion as by said charter provided, declaring all the remaining installments due and collectible, with interest thereon.

Wherefore, plaintiff prays judgment for the amount of said special tax bill remaining unpaid, to-wit: Twelve Hundred and Ninety-seven Dollars and 60c. ($1297.60) with interest upon the first installment thereof, at the rate of 6% per annum from the 9th day of April, 1910, the date of the notice aforesaid, to the 9th day of May, 1910, the date of Maturity of said installment, and at the rate of 8% per annum from the 9th day of May, 1910, until paid and with interest upon the rest of said special tax bill at the rate of 6% per annum from the 9th day of April, 1910, to the date of the filing of this petition, and at the rate of 8% per annum from the date of such filing of this petition until paid, and the costs of this suit, and that said judgment be declared a special lien against the lot or parcel of ground hereinbefore described belonging to the defendants above named and the said lot or parcel of ground be ordered sold to satisfy said sum with interest and costs, and that plaintiff may have such other and further relief as to the Court may seem proper.

On the eleventh day of November, 1910, the answer of all the defendants was filed in the cause, which said answer, omitting caption and signature, was as follows:

13 *Answer.*

1. Now come all the defendants and file this their answer to the petition of the plaintiff herein, and for such answer, deny each and every allegation in said petition made or contained.

2. And for another and first affirmative answer to said petition the said defendants state that they are, and that at all the times mentioned or referred to in said petition they were, the owners of the land mentioned and described in said petition; that the city of St. Louis heretofore undertook, but without warrant of law and without right so to do, to pass the alleged ordinances numbered respectively 21974 and 21975 mentioned in said petition, and to award the work of constructing the sewers mentioned in said petition to the plaintiff, and to let out the same to the plaintiff by the alleged contract mentioned in said petition; that thereafter the plaintiff entered upon the performance of said alleged contract and constructed said sewers, and that thereafter said sewers were accepted by the said city; that by said alleged ordinance numbered 21975 said city of St. Louis undertook to provide for the construction of said sewers as a district sewer, and that by said alleged ordinance numbered 21974 said city undertook to prescribe and establish for such sewer the alleged sewer district mentioned in the petition, the same being hereinafter mentioned and referred to as alleged Manchester Road Sewer District Number Three.

3. The defendants further state that, after said sewers were constructed and accepted as aforesaid, the sewer commissioner of said

or authority as such Comptroller to countersign said alleged special tax bill herein sued upon, or any of the installments thereof, or to do any of the matters and things done by him with respect thereto.

6. And for another and third affirmative defense of the petition of the plaintiff these defendants state that they are, and that at all the times mentioned or referred to in said petition they were, the owners of the land mentioned and described in said petition; that the city of St. Louis heretofore undertook, but without warrant of law and without right so to do, to pass the alleged ordinances numbered respectively 21974 and 21975 mentioned in said petition, and to award the work of constructing the sewers mentioned in said petition to the plaintiff, and to let out the same to the plaintiff by the alleged contract mentioned in said petition; that thereafter the plaintiff entered upon the performance of said alleged contract and constructed said sewers, and that thereupon said sewers were accepted by the said city; that by said alleged ordinance numbered 21975 said city of St. Louis undertook to provide for the construction of said sewers as a district sewer, and that by said alleged ordinance numbered 21974 said city undertook to prescribe and establish for such sewer the alleged sewer district mentioned in the petition, the same being hereinafter mentioned and referred to as alleged Manchester Road Sewer District Number Three.

7. And these defendants further state that among the sewers provided for as aforesaid and constructed by the plaintiff as aforesaid, there was one on Kings Highway Boulevard, from Columbia Avenue southwardly to Odell Street, and another on said
18 Kings Highway Boulevard from said Odell Street southwardly to Arsenal Street; that said two sewers on said Kings Highway Boulevard, together formed one continuous sewer from said Columbia Avenue to said Arsenal Street, and were among the largest and most important sewers provided for by said alleged ordinance number 21975 and said alleged contract.

8. And the defendants further state that said City of St. Louis now holds and owns, and has at all the times mentioned or referred to in the petition of the plaintiff, and at all times since the twentieth day of October, 1868, held and owned a large tract of land lying in said City and described, as follows:

9. Beginning at the point of intersection of the eastern line of said Kings Highway Boulevard with the northern line of said Arsenal Street, and running thence northwardly with the eastern line of said Kings Highway Boulevard fourteen hundred and seventy-seven (1477) feet and five (5) inches, more or less, to a point in said east line which is one hundred and eigthy-four feet (184) and five (5) inches, south of the south line of Magnolia Avenue, thence eastwardly and parallel with said south line of Magnolia Avenue, one thousand feet (1000′) more or less, thence southwardly and parallel with said east line of said Kings Highway Boulevard fourteen hundred and seventy-seven (1477) feet and five (5) inches,

more or less, to a point in the north line of said Arsenal Street, and thence westwardly with said north line of Arsenal Street one thousand (1000) feet more or less to the point of beginning.

10. And the defendants further state that the aforesaid tract of land held and owned by said City is part of a larger body of land held and owned by said City; that said Magnolia Avenue runs from said Kings Highway Boulevard eastwardly and parallel with said Arsenal Street, and is about one hundred and twenty-three
19 (123) feet southwardly of said Columbia Avenue; that the aforesaid tract of land held and owned by said City fronts, and at all the times herein mentioned or referred to fronted, on the east line of said Kings Highway Boulevard, from the north line of said Arsenal Street to a point fourteen hundred and seventy-seven (1477) feet and (5) inches northwardly thereof, and that said front accordingly was fourteen hundred and seventy-seven (1477) feet and five (5) inches in length on said east line of said Kings Highway Boulevard; that said Odell Street is, and at all said times was, a public street running parallel with said Columbia Avenue, and also with said Arsenal Street, and being intermediate between the two; that the aforesaid sewer on Kings Highway Boulevard from said Columbia Avenue to said Odell Street is about fourteen hundred and fifty (1450) feet in length, and said sewer on said Kings Highway Boulevard from Odell Street to said Arsenal Street is about four hundred and fifty (450) feet in length, so that the two said sewers together have a combined length of about nineteen hundred (1900) feet, and that the said two sewers for their entire combined length lie and are constructed on said Kings Highway Boulevard directly in front of said tract of land held and owned by said City, excepting only that about four hundred and twenty-five (425) feet in length of said sewer on said Kings Highway Boulevard from said Columbia Avenue to said Odell Street lies and is constructed northwardly of said tract of land.

11. And the defendants further state that said tract of land held and owned by said City derives and possesses, and at all times since the construction of the aforesaid sewers constructed by the plaintiff derived, possessed and enjoyed all advantages of drainage and all sewage facilities which any other land in the aforesaid alleged Manchester Road Sewer District Number Three derived or
20 possessed therefrom; that the same was benefited by said sewers in every way in which any other land in said alleged sewer district was benefited thereby, and also to as great an extent as any other land in said alleged sewer district; that of right said tract of land should have been included in said alleged Manchester Road Sewer District Number Three and borne its proper share of the cost of the aforesaid sewers constructed by the plaintiff, and that, if it had been included in said alleged sewer district, it would have borne, and said City would have been compelled to pay, its proper share of said cost; and that the charter of said city provides, and at all the aforesaid times provided, that if any property in a district established as provided by said charter is not liable to special

assessment, the said City shall pay the cost of the improvement which would have been assesed against said property, and further, that every ordinance requiring work to be done shall contain a specific appropriation from the proper revenue and fund for such cost thereof, as may be payable by said City based upon an estimate of cost, to be endorsed by the President of the Board of Public Improvements on said ordinance for the whole of the cost of the proposed work.

12. And the defendants further state that the aforesaid tract of land held and owned by said City was not, nor was any part thereof, included or embraced in the aforesaid alleged sewer district, and that said City, and its representatives and officers, omitted to include the said tract of land in said alleged sewer district in order that, and with the intent that, the said tract of land should not, and that none thereof should be assessed or charged with any part of the cost of the aforesaid sewers constructed as aforesaid, and that said City should not be required to pay, and should not pay, any part of the cost of said sewers; that in point of fact said tract of land was not, nor
21 was any part thereof, assessed or charged with, and said City was not compelled to pay, and has not paid on account thereof, any part of the cost of said sewers, but that the whole of said cost was assessed against lands contained in said alleged sewer district.

13. And the defendants further state that all the aforesaid proceedings, matters and things, and especially the aforesaid alleged ordinances and the aforesaid assessment of the cost of the aforesaid sewers, and the aforesaid special tax bill, were in intentional disregard of the duties of said City towards, and of the rights of, the owners of the various tracts and lots of land embraced in said alleged sewer district, and of these defendants among others; that the same were oppressive and arbitrary and discriminated unjustly and unfairly and wilfully against all the said owners, including these defendants, and the aforesaid lots or tracts of land, including the land of these defendants, and in favor of the said city and of said tract of land held and owned by it as aforesaid; and that the same were contrary to law; and that by the said proceedings, matters and things, and especially said alleged ordinances, said assessment of the cost of said sewers, and said alleged special tax bill, the defendants were denied the equal protection of the laws contrary to the provisions of the Constitution of the United States, to-wit, the Fourteenth Amendment of said Constitution, and were deprived of property without due process of law contrary to the provisions of said Constitution, to-wit, of said Fourteenth Amendment thereof, and also contrary to the Constitution of this State.

Wherefore, having fully ansered, these defendants pray to be discharged with judgment for their costs.

On the twenty-sixth day of November, 1910, the reply of the plaintiff was filed in the cause, which said reply, omitting caption and signature, was as follows:

22 The plaintiff for reply to the answer denies the allegations thereof.

On the third day of January, 1911, the parties to the cause filed therein a stipulation, waiving trial by jury; and on the fifth day of January, 1911, the trial of this cause was commenced before the Court.

On the sixteenth day of January, 1911, and prior to the submission of this cause to the court, the defendants made and filed in this cause a request in writing for a statement in writing of the court's conclusions of facts and conclusions of law under and in accordance with the statute in that behalf made, which said request so made and filed is set forth in full in the bill of exceptions in said cause, and on page- 100, 101, of this abstract. Thereupon this cause was submitted to the Court, and thereafter, on the third day of April, 1911, on submission, the Court made and filed in this cause its statement in writing of its conclusions of facts found by it separately from its conclusions of law, which said statement in writing is fully set forth in said bill of exceptions and at pages 101 et seq. of this abstract.

And on said third day of April, 1911, and simultaneously with the making and filing by the Court herein of said statement in writing of the Court's conclusions of facts and conclusions of law, the Court found and rendered judgment for the plaintiff in the sum of one thousand, three hundred and ninety-four dollars and eighty-three cents, with a lien on the property described in the petition, which said judgment, omitting the caption of this cause, was as follows:

Now at this day this cause coming on for hearing, come the parties, plaintiff and defendants, by their respective attorneys, and a jury having heretofore been waived, said parties submit this cause to the Court upon the pleadings, the evidence and the proof
23 adduced, and the special tax bill upon which this action is founded. The Court having heard and duly considered the same, being fully advised of and concerning the premises, doth find, adjudge and determine that plaintiff is entitled to recover the sum of Thirteen Hundred and Ninety-four 83/100 ($1,394.83) Dollars on account of the said special tax bill in plaintiff's petition described, being tax bill No. 609 dated on the 23rd day of February, 1910, and issued by the proper officers of the city of St. Louis, and being for work done in constructing sewers in Manchester Road Sewer District No. 3 under authority of Ordinance Nos. 21974 and 21975, and the Court doth further find, adjudge and determine that said special tax bill is a lien upon the realty in the petition described as follows, to-wit:

A certain lot of ground having an aggregate front of Four Hundred and Eight-six and Four One Hundredths (486.04) feet on the West line of Kingshighway Boulevard, and more particularly described in Volume I, page 35 (now 45) of the records of the Assessor of special taxes of the City of St. Louis, and on special tax bill referred to above, as follows, to-wit: in United States Survey 2037, Vol. I, page 45, (formerly 35), beginning at the intersection of the

West line of Kingshighway Boulevard and the South line of proposed Bischoff Avenue Sixty (60) feet wide, thence Westwardly along the South line of proposed Bischoff Avenue sixty (60) feet wide to a point one hundred and seventy-one (171) feet West of the Western line of Kingshighway Boulevard, thence Southwardly parallel with and one hundred and seventy-one (171) feet West of the Western line of Kingshighway Boulevard Five Hundred and Sixty Three and Eighty-Nine One Hundredths (563.89) feet to the North line of Old Manchester Road, thence North Eastwardly along the North line of Old Manchester Road One Hundred and Eighty-Nine and Forty-Six Hundredths (189.46) feet to the West line of
24 Kingshighway Boulevard, thence Northwardly along the Western line of Kingshighway Boulevard Four Hundred and Eighty-six and Four hundredths (486.04) feet to the place of beginning, bounded North by proposed Bischoff Avenue, East by Kingshighway Boulevard, South by Old Manchester Road, West by Goldsmith, et al.

The Court doth further find, adjudge and determine that said special tax bill, together with interest thereon, and the costs herein remain due and unpaid, and that the plaintiff is entitled to enforce and foreclose the lien thereof. It is therefore now ordered, adjudged, and decreed by the Court that plaintiff is entitled to have and recover the said sum of Thirteen Hundred and Ninety-four 83/100 ($1394.83) Dollars upon said special tax bill, and is also entitled to the enforcement of the lien thereof against the realty aforesaid, and that the same be done by a sale, according to law, of said realty, and that whatever right, title, interest or estate defendants may have or hold in said realty be foreclosed and forever barred by the enforcement and foreclosure of the lien of said special tax bill, and it is further ordered by the Court adjudged and decreed that this judgment shall be and constitute a special judgment against the realty aforesaid in the said sum of Thirteen Hundred and Ninety-four 83/100 ($1,394.83) Dollars, interest and costs herein, and that payment thereof shall be enforced according to law and that plaintiff have special execution thereof.

Finding of Facts, Conclusions of Law, and Instructions Filed.

On the sixth day of April, 1911, defendants filed their motion for a new trial herein; and on the 8th day of May, 1911, the Court made and entered in this cause an order by which the aforesaid statement in writing of the Court's conclusions of facts and conclusions of law was modified by the Court as set forth in said bill of excep-
25 tions and at page 111 of this abstract, and was in all other respects confirmed; and by said order on said 8th day of May, 1911, the Court also over-ruled the aforesaid motion for a new trial.

On the second day of June, 1911, the defendants filed herein their bill of exceptions, which said bill of exceptions was duly signed by Honorable Hugo Muench, Judge of the Court before whom the

cause was tried, and on the third day of June, 1911, an affidavit for an appeal and an appeal bond was filed in this cause by the defendants herein, and an appeal to this Court was duly allowed to all of the defendants.

On the fifth day of June, 1911, the docket fee of ten dollars for said appeal to this Court was duly paid by the appellants.

On March 12th, 1914, there was filed in this Court a stipulation of the parties, which, omitting caption and signatures, was as follows:

Stipulation.

It is stipulated and agreed by and between the parties to the above-entitled cause that, inasmuch as the special tax bill sued upon in said cause has been lost or mislaid, the same need not, nor need its purport, be set forth in the abstract of the record to be filed by the appellants, but that said special tax bill shall, if found, be produced at the hearing of this cause on request of either party or on request of the Court.

Dated St. Louis, Missouri, March 11th, 1914.

Bill of Exceptions.

And said bill of exceptions filed by the defendants as aforesaid on the second day of June, 1911, was as follows:

Be it remembered that on the 5th day of January, 1911,
26 the above entitled cause came on for trial before the Honorable Hugo Muench, Judge in Division No. 1 of said court, the plaintiff appearing by A. R. Taylor, Esq., and Howard Taylor, Esq., and the defendants appearing by David Goldsmith, Esq., and the following proceedings were had:

Plaintiff's Evidence.

The plaintiff, to sustain the issues on its part, offers and introduces evidence, as follows:

JOSEPH PASQUIER, sworn for plaintiff, testifies as follows:

Direct examination.

By Mr. Taylor:

Q. State to the Court your name?
A. Joseph Pasquier.
Q. What has been your business for the last number of years?
A. Assessor of Special Taxes.
Q. In what office?
A. The office of the President of the Board of Public Improvements.

Q. How long have you been in that office as the Assessor of Special Taxes?

A. For about 27 years, I think, altogether.

Q. Were you in that office during the occupancy of Mr. A. J. O'Reilly, as President of the Board of Public Improvements?

A. Yes, sir.

Q. And since his succession by Mr. Maxime Reber have you been constantly in that office?

A. Yes, sir; I have.

Q. Are you familiar with the signatures of Mr. Maxime Reber and Mr. A. J. O'Reilly?

A. Yes, sir.

Q. Also of Benjamin J. Taussig, and J. Y. Player, the present and former comptroller?

A. Yes, sir; I am famiilar with the signature of Mr. Player but not so well with Mr. Taussig's.

27 Q. I will ask you if that is the signature of Maxime Reber?

A. Yes, sir.

Q. Attached to that tax bill?

A. Yes, sir.

Q. Is that the signature of A. J. O'Reilly, the former President of the Board?

A. Yes, sir; it is.

Q. Is that the signature of James Y. Player, the former Comptroller?

A. It is, sir.

Q. Now, you say you are not so familiar with Mr. Taussig's?

A. No, sir; I am not so familiar with it.

Cross-examination.

By Mr. Goldsmith:

Q. Mr. Maxime Reber is the present President of the Board of Public Improvements, and Mr. A. J. O'Reilly was his predecessor, is that correct?

A. It is, sir.

Q. When did the term of office of Mr. O'Reilly end and when did Mr. Maxime Reber's term begin?

A. About a year and a half ago I guess, or a little over.

Q. So that Mr. A. J. O'Reilly has not been President of the Board of Public Improvements for a year and a half approximately?

A. No, sir; he has not.

Q. That is correct, is it?

A. That is correct.

Q. Is the same true with regard to the comptroller?

A. Yes, sir.

Q. That is, Mr. B. J. Taussig is the present comptroller?

A. Yes, sir.

Q. And he assumed office about a year and a half ago?

A. Yes, sir.

Q. His predecessor was James Y. Player, wasn't it?
A. Yes, sir.
Q. And Mr. Player vacated the office of comptroller about a year and a half ago?
A. Yes, sir.
Q. In other words, when he went out Mr. Taussig went in and when Mr. O'Reilly went out Mr. Reber went in?
A. Yes, sir.
Q. Did the city of St. Louis issue to the plaintiff in this case, the George G. Prendergast Construction Company, any other tax bill before this one now in suit and which has been shown to you
28 was issued?
A. Yes, sir.
Q. I show you what purports to be a special tax bill, the same being No. 609, dated June 18, 1906, and purporting to be issued to the George G. Prendergast Construction Company for constructing sewers in the Manchester Road sewer district No. 3; I will ask you whether or not this was the prior tax bill to which you have made reference?
A. Yes, sir; this is one of the bills.
Q. Is not that the only one that was issued against the property with which we are now concerned?
A. 609, yes, sir.

Mr. Taylor: Is that the same amount?
Mr. Goldsmith: I will show that.
The Witness: Yes, sir; the same amount.

Q. By that you mean the former tax bill was for the same amount as the tax bill now in suit?

By the Court: What is that amount?
A. $1,297.60.

By Mr. Goldsmith: The number of the tax bill is the same?
A. The number of the tax bill is the same, 609, yes, sir.
Q. Are the parties against whom both are issued the same?
A. Yes, sir.
Q. But the dates of the tax bill are different, are they not?
A. Yes, sir; they are different, one is February 23, 1910, and the other is June 18, 1906.
Q. What became of the latter tax bill, that is the one dated June 18, 1906?
A. This is the original bill apparently.
Q. What was done with it?
A. It was cancelled, that bill was cancelled.
Q. You mean it was surrendered to the city and marked cancelled?
A. And marked cancelled, yes, sir.
Q. By whom was it marked cancelled?
A. By the president of the Board of Public Improvements.
Q. Who was that?

A. That was Mr. Reber.
Q. When was it marked cancelled, if you know?
A. February 23, 1910.
Q. And at the time it was marked cancelled this other tax bill now in suit was issued in its place, is that the fact?
A. Yes, sir; it was.
Q. You have said it was marked cancelled by the president of the Board of Public Improvements?
A. Yes, sir.
Q. Please observe the notification in red ink on the tax bill dated June 18, 1906, and see whether you wish that still to be your testimony?
A. That is the best of my recollection, sir.

Redirect examination.

By Mr. Taylor:

Q. The bill of date June 18, 1906, was surrendered by the plaintiff, the Prendergast Construction Company, to the city and this bill on which this suit is brought was issued in lieu thereof on the 23rd of February, 1910?
A. Yes, sir; it was.

Recross-examination.

By Mr. Goldsmith:

Q. Please state when the tax bill dated June 18, 1906, was issued?
A. It was issued on June 18, 1906, originally issued.
Q. This tax bill, June 18, 1906, was issued in connection with the other tax bills issued to the plaintiff for the construction of Manchester Road sewer district No. 3?
A. That is right.

JOHN F. CHARTRAND, sworn for plaintiff, testifies as follows:

Direct examination.

By Mr. Taylor:

Q. State your name to the court.
A. John F. Chartrand.
Q. What is your business?
A. Special tax clerk in the City Comptroller's office.
Q. How long have you been such?
A. About nine years and a half.
Q. Are you familiar with the signature of Mr. B. J. Taussig, the comptroller?
A. Yes, sir.
Q. Is that his signature attached to that tax bill?

A. That is his signature, yes, sir.
Q. You know also the other signatures?
A. Yes, sir.
Q. Are they the signatures respectively of Reber, O'Reilly and Player?
A. Yes, sir.

Cross-examination.

By Mr. Goldsmith :

Q. You heard the testimony of Mr. Pasquier?
A. Yes, sir.
Q. Are the facts with regard to the issue of this first bill of June 18, 1906, its cancellation and the issuing in its place of the one now in suit, as stated by him?
A. Yes, sir.

Plaintiff's counsel offer in evidence the tax bill referred to.

Defendants' counsel objects to the tax bill being received in evidence for the following reasons:

1st. Because the tax bill now in suit does not designate any person to receive payment as required by the provisions of the charter of the City of St. Louis.

2nd. Because the city had no authority to cancel the tax bill dated June 18, 1906, and issue the tax bill now in suit in its place.

3rd. Because the tax bill now in suit is not in accordance with the requirements of the law for the following reasons:

Laying aside the question whether a tax bill can be surrendered and another issued in its place, and considering the matter merely as if the present bill was an amendment of the one surrendered, the decisions of the Supreme Court require that the amendment should be made by the officers who made the tax bill and, therefore, as the original tax bill was made when Mr. O'Reilly was in office as president of the Board of Public Improvements and Mr. James Y.
31 Player was comptroller, the amendment would have to be made by these officers. This was not done, that is the one now in suit is not made by those parties; and while their names appear in one place on the special tax bill their names do not at all appear in connection with the installments; that the names of Maxime Reber as president of the Board of Public Improvements and B. J. Taussig as comptroller alone appear with reference to those installments.

Said objections were overruled by the court and the defendants, then and there, duly excepted to the action of the court in overruling the same. (This special tax bill is called for by the bill of exceptions, but it has been lost or mislaid, and a stipulation has therefore been filed in this court by the parties providing for the omission of this tax bill from this abstract. This stipulation is set forth at page 18 of this abstract.)

Thereupon the plaintiff offered in evidence a notice to the defendants of the issue of the aforesaid special tax bill, with returns of the service thereof, which said return showed that the notice was served on the defendants, David Goldsmith and Esther I. Goldsmith, on April 11th, 1910 and on the defendant-, Rebecca Loth, Amelia Goldsmith and Rose Goldsmith, on April 9th, 1910, and further showed that Joseph Goldsmith could not be found. (These notices, together with the returns of service thereof, are omitted since no question arises in the case with regard to their sufficiency).

This was all the evidence introduced by the plaintiff in chief.

Defendants' Evidence.

Defendants to sustain the issues on their part offered and introduced evidence, as follows:

Defendants' counsel offered and read in evidence a certi-
32 fied copy of Ordinance No. 21,974, entitled "An Ordinance to Establish Manchester Road Sewer District No. 3, same being in words and figures as follows, to-wit:

(21974.)

An Ordinance to Establish Manchester Road Sewer District Number Three.

Be It Ordained by the Municipal Assembly of the City of St. Louis, as follows:

Section One. There is hereby established in the City of St. Louis a sewer district to be known as Manchester Road Sewer District Number Three, bounded as follows, to-wit: Beginning at a point in the center line of Arsenal street and the center line of Kingshighway boulevard and running thence northwardly on the center of Kingshighway boulevard to the south line of Tower Grove Park Addition, produced, thence eastwardly on the said south line of Tower Grove Park Addition and said south line, produced, to a point seven hundred and sixty feet west of the west line of a private street known as Alfred avenue, produced, thence northwardly parallel to a private street known as Alfred avenue and Alfred avenue and Alfred avenue produced and seven hundred and sixty feet west of the west line thereof, to a point six hundred and twenty-six feet north of the north line of Magnolia avenue, thence westwardly parallel to Magnolia avenue and six hundred and twenty-six feet north of the north line thereof to a point ten hundred and sixty feet west of the west line of a private street known as Alfred avenue, thence northwardly parallel to a private street known as Alfred avenue and Alfred avenue, produced, and ten hundred and sixty feet west of the west line thereof, to the north line of Shenandoah avenue, thence westwardly on the north line of Shenandoah avenue to a point three hundred and sixteen feet three and three quarters inches
33 east of the east line of Kingshighway boulevard, thence northwestwardly in a straight line to a point in the southeast

line of Old Manchester road and fifty-seven feet ten and one-quarter inches northeast of the east line of Kingshighway boulevard, thence northeastwardly on the southeast line of Old Manchester road to the center line of Accomac street, thence westwardly on the center line of Accomac street to a point one hundred and ninety-two feet eleven inches east of the east line of Kingshighway boulevard, thence southwardly parallel to Kingshighway boulevard and one hundred and ninety-two feet eleven inches east of the east line thereof to the south line of Accomac street thence westwardly on the south line of Accomac street to the east line of Kingshighway boulevard, thence southwardly on the east line of Kingshighway boulevard to the center of Bischoff avenue, thence westwardly on the center of Bischoff avenue to a point one hundred and seventy-one feet west of the west line of Kingshighway boulevard, thence southwardly parallel to Kingshighway boulevard and one hundred and seventy-one feet west of the west line thereof, to a point three hundred and sixty-seven feet south of the south line of Bischoff avenue, thence westwardly in a straight line to a point in the center line of Cooper street and one hundred and seventy-one feet north of the north line of Old Manchester road, thence southwardly on the center of Cooper street to the north line of Old Manchester road, thence eastwardly on the north line of old Manchester road to the east line of the St. Louis, Oak Hill and Carondelet Railway Company's right of way, thence southwardly on the east line of the St. Louis, Oak Hill and Carondelet Railway Company's right of way to the center of Arsenal street, thence eastwardly on the center of Arsenal street to a point two hundred and fifty feet east of the east line of Brannon
34 avenue, thence southwardly parallel to Brannon avenue and two hundred and fifty feet east of the east line thereof, to a point two hundred feet south of the south line of Arsenal street, thence eastwardly parallel to Arsenal street and two hundred feet south of the south line thereof, to a point nine hundred feet east of the east line of Brannon avenue, thence northwardly parallel to Brannon avenue and nine hundred feet east of the east line thereof, to the center of Arsenal street, thence eastwardly on the center of Arsenal street to the place of beginning.

Approved March 31, 1905.

I, M. R. H. Witter, Register of the City of Saint Louis, hereby certify the foregoing to be a true copy of the original, on file in this office, of an Ordinance passed by the Municipal Assembly of the City of Saint Louis, "entitled" An Ordinance to establish Manchester Road Sewer District Number Three and numbered 21,974.

In Testimony Whereof, I have hereunto set my hand, and affixed the seal of the City of Saint Louis, this 2nd day of October, 1911.

[SEAL.] M. R. H. WITTER,
Register.

Also, an Ordinance No. 21,975, entitled, "An ordinance to provide for the construction of a sewer in Manchester Road Sewer District No. 3," same being in words and figures as follows, to-wit:

(21975.)

An Ordinance to Provide for the Construction of Sewers in Manchester Road Sewer District Number Three.

Be It Ordained by the Municipal Assembly of the City of St. Louis, as follows:

Section One. The Board of Public Improvements is hereby authorized and directed to cause district sewers to be constructed within Manchester Road Sewer District Number Three, with all the lateral sewers, inlets, manholes, junctions and other appurtenances necessary to render said sewers complete and efficient. Said sewers shall be made and located as described in the following sections of this ordinance.

Section Two. A sewer to be made of brick, laid in Portland cement mortar, four feet and two inches in mean diameter, on Kingshighway boulevard, from Bischoff avenue southwardly to Columbia avenue, thence westwardly on Columbia avenue to the east north and south alley in city block number forty hundred and seventy-one east. A sewer to be made of brick, laid in Portland cement mortar, three feet and four inches in mean diameter, on Columbia avenue from the east north and south alley in city block number forty hundred and seventy-one east, westwardly to the west north and south alley in said city block. A sewer to be of brick, laid in Portland cement mortar, thirty-five inches in mean diameter, on the west north and south alleys in city blocks numbered forty hundred and seventy-one east and forty hundred and seventy east, from Columbia avenue southwardly to Reber place.

Section Three. Sewer to be made of brick, laid in Portland cement mortar twenty-seven and one-half inches in mean diameter, as follows, to-wit: On Kingshighway boulevard from Columbia avenue southwardly to Odell street; on the west north and south alley in city block number forty hundred and sixty-nine east from Reber place southwardly to Odell street. Sewers to be made of brick laid in Portland cement mortar, twenty-five inches in mean diameter, as follows, to-wit: On Kingshighway boulevard from Odell street southwardly to Arsenal street; on Old Manchester road, from Kingshighway boulevard westwardly to the east north and south alley in city block number forty-eight hundred and twenty-one A, thence southwardly on the east north and south alleys in city blocks numbered forty-eight hundred and twenty-one A and forty-eight hundred and twenty B, to the east and west alley in city block number forty-eight hundred and twenty-one B; on Odell street from the west north and south alley in city block number forty hundred and sixty-nine east, westwardly to Hereford street; on Reber place, from the west north and south alley in city block number forty hundred and seventy east, westwardly to Hereford street; on Magnolia avenue, from the west north and south alley in city block

number forty hundred and seventy-one east, westwardly to Hereford street.

Section Four. Sewers to be made of vitrified clay pipe, eighteen inches in diameter, as follows, to-wit: On Old Manchester road from the east north and south alley in city block number forty-eight hundred and twenty-one A, westwardly about five hundred and fifty feet; on the east and west alley in city block number forty-eight hundred and twenty-one B, from the east north and south alley in said city block, westwardly about four hundred feet; on Columbia avenue, from the west north and south alley in city bock number forty hundred and seventy-one east, westwardly to Hereford street; on Arsenal street from Hereford street westwardly about four hundred and eighty feet; on Arsenal street from Kingshighway boulevard, westwardly about three hundred and fifty feet; on Hereford street from Odell street, southwardly to Arsenal street.

Section Five. Sewers to be made of vitrified clay pipe, fifteen inches in diameter, as follows, to-wit: On the alley in city block number forty hundred and ninety-four, from Accomac street to Old Manchester road; on Shenandoah avenue from Kingshighway boulevard, eastwardly about three hundred and eighty feet; on Magnolia
37 avenue from Kingshighway boulevard, eastwardly about four hundred feet; on Old Manchester road, from the eighteen inches in diameter pipe sewer above described, westwardly about five hundred feet; on the east and west alley in city block number forty-eight hundred and twenty-one B, from the eighteen inches in diameter pipe sewer above described, westwardly about three hundred and fifty feet; on the west north and south alley in city block number forty hundred and sixty-eight east, from Odell street southwardly to Arsenal street; on Arsenal street, from the eighteen inches in diameter pipe sewer above described, westwardly about three hundred feet; on the east and west alley in city block numbr forty-eight hundred and twenty-one A. From the east north and south alley in said city block, westwardly about three hundred and thirty feet; on Botanical avenue from Kingshighway boulevard, eastwardly about four hundred feet.

Section Six. Sewers to be made of vitrified clay pipe, twelve inches in diameter, as follows, to-wit: On Magnolia avenue from the fifteen inches in diameter pipe sewer above described, eastwardly about three hundred and twenty feet; on the east and west alley in city block number forty-eight hundred and twenty-one B, from the fifteen inches in diameter pipe sewer above described, westwardly about three hundred and twenty feet; on Old Manchester road from the fifteen inches in diameter pipe sewer above described, westwardly about four hundred feet; on Hereford street from Columbia avenue southwardly about two hundred and thirty feet; on Magnolia avenue from the west north and south alley in city block number forty hundred and seventy-one east, eastwardly about two hundred feet; on Reber place from the west north and South alley in city block number forty hundred and seventy east, eastwardly about one hundred

and forty feet; on Odell street from the private eighteen
38 inches in diameter pipe sewer, westwardly about two hundred feet; on Arsenal street from the fifteen inches in diameter pipe sewer above described westwardly about four hundred and forty feet on Botanical avenue from the fifteen inches in diameter pipe sewer above described, eastwardly about three hundred and twenty feet.

Section Seven. As soon as said district sewers, with their inlets, manholes and other appurtenances are fully completed, the Sewer Commissioner shall cause to be computed the total cost thereof, and certify the same to the President of the Board of Public Improvements, and the President of said Board shall assess it as a special tax against all the lots of ground in the district respectively, without regard to improvements, and in the proportion that their respective areas bear to the area of the whole district, exclusive of the public highway, and shall cause to be issued a special tax biil against each lot in the district, giving the name of the owner thereof, in favor of the contractor, which shall be registered, delivered, collected and paid as provided in Sections Twenty-four, Twenty-five and Twenty-six of Article Six of the Charter of the City of St. Louis; provided, however, that the special tax bills above directed to be issued, shall be divided into five equal parts, payable and collectible as provided in Section Twenty-five of Article Six of the Charter of the City of St. Louis.

Approved March 31, 1905.

I, M. R. H. Witter, Register of the City of St. Louis, hereby certify the foregoing to be a true copy of the original, on file in this office, of an Ordinance passed by the Municipal Assembly of the City of Saint Louis, "entitled" An Ordinance to provide for the construction of sewers in Manchester Road Sewer District Number Three and numbered 21,975.

39 In testimony whereof, I have hereunto set my hand, and affixed the seal of the City of Saint Louis, this 2nd day of October, 1911.

[SEAL.] M. R. H. WITTER,
Register.

JOSEPH PASQUIER, heretofore called as a witness by the plaintiff, being called for defendants, testified as follows:

Direct examination.

By Mr. Goldsmith:

Q. The two ordinances which I have just offered are the ordinances under which the work for which the special tax bill now in suit was issued?

A. Yes, sir; I believe they are.

Q. Will you examine them and see?

A. Yes, sir; those are correct, 21,974 and 21,975.

By Mr. Taylor: Those are the numbers of the ordinances?
A. Yes, sir.

By Mr. Goldsmith: These are the ordinances then under which this work was done?
A. Yes, sir; these are certified copies.
Q. Is that correct?
A. I have no doubt they are, sir.
Q. Well, don't you know from your position as Assessor of Taxes, you assisted in the assessment?
A. Yes, sir; I did.
Q. Well, can't you tell, examine the ordinances and see?
A. Yes, sir; those are correct.
Q. That is the fact?
A. Yes, sir.
Q. Now, have you a plat of Manchester Road Sewer District, No. 3?
A. Yes, sir.
Q. Which was established by this ordinance No. 21,975?
A. 21,974.
A. Yes, sir; I have that plat.
A. Yes, sir; I have that plat
Q. Is this the plat (handing same to witness)?
A. That is the plat.

Defendants' counsel offered and placed in evidence the said plat referred to which is as follows, to-wit:
(For the convenience of the Court this plat is inserted at the close of this abstract.)

40 By Mr. Taylor: That plat is part of the files of your office, is it?
A. Yes, sir; we keep that in the sewer district.
By Mr. Goldsmith: Does this plat also show where the sewers constructed in that district were laid under ordinance 21,975?
A. Yes, sir; it shows that and the boundaries of the district.
Q. These white lines in the center of streets show the location of the sewers, do they not?
A. Yes, sir; they are partly broken.
Q. What do you mean by partly broken?
A. They are not continuous, you see, they are distinguished from the lines of the sewer, these are the district lines.
Q. What are these?
A. This is the boundary line of the district, you see that is heavier.
The Court: It is a heavier white line.
Mr. Goldsmith: The ones for the district.
By the Court: For the sewer district, the widest ones are the lots?
A. Yes, sir; those are the lot lines.
By Mr. Goldsmith: But these that are partly broken designate the lines of the sewer district?
A. Yes, sir.
Q. These heavier ones represent the location of the sewers?

A. Yes, sir.

By the Court: The heavy white lines unbroken are sewer lines and the broken ones are sewer district lines?

A. Yes, sir.

By Mr. Goldsmith: Now, referring to Kingshighway you have two lines, one partly broken and one continuous?

A. Yes, sir.

Q. Now the partly broken one represents the line of the district and the heavier one the line of the sewer?

A. Of the sewers, yes, sir.

Q. What property is there adjacent to Kingshighway on the east between Arsenal Street and that open section along there?

A. The south line of Tower Grove Park addition.

41 Q. From this line that is marked the south line of Tower Grove Park Addition that designates one of the boundary lines of the district, does it not?

A. Yes, sir.

Q. And isn't that also the dividing line between Tower Grove Park Addition and Tower Grove Park?

A. No, this is the north line of Tower Grove Park.

Q. That is what I say, it is the dividing line?

A. It is the dividing line between Tower Grove Park and Tower Grove Park Addition.

By Mr. Taylor: Which side of Tower Grove Park is the Tower Grove Park Addition, which side of Kingshighway?

A. On the east side.

By Mr. Goldsmith: They are both east of Kingshighway?

A. Yes, sir.

By the Court: The Tower Grove Park Addition is north of the Park?

A. Yes, sir; the Tower Grove Park Addition is south of Magnolia Avenue.

By Mr. Goldsmith: In other words, it immediately adjoins Tower Grove Park on the north?

A. It does.

By the Court: That was a portion of the ground talked about to be taken in the park sometime, not belonging to the Shaw Estate?

A. I believe it was.

Mr. Goldsmith: I think your Honor is mistaken, I think this is a private addition.

The Court: Originally it was Shaw property.

Mr. Goldsmith: No, I think not, your Honor, that is why it was excepted from the deed, because it was not Shaw property, I will have the deeds here.

The Court: My general impression was that that was withheld because it was valuable residence property.

Mr. Goldsmith: Your Honor has another matter in mind which will appear from the deed, the deed conveying the land for Tower Grove Park provides for a strip of 200 feet, for residence purposes all around it; this will appear in evidence.

Q Now, is any part of Tower Grove Park in Manchester Road Sewer District No. 3?

A. No, sir.

42 Q. The boundary line of that district runs along the center line of Arsenal Street, then goes along——

Mr. Taylor: Give the points of compass.

By Mr. Goldsmith: That district line runs, does it not, along the center line of Arsenal Street eastwardly until Kingshighway Boulevard, is that right?

A. To the Center line of Kingshighway Boulevard.

Q. Then north along the center line of Kingshighway Boulevard to the extension of the dividing line between Tower Grove Park and Tower Grove Park Addition?

A. That is right.

Q. Then eastwardly along that dividing line to a point 760 feet east of Kingshighway?

A. No, 760 feet east of Kingshighway.

Q. Is that right?

A. No, it don't give that point, it gives a point——

Q. I will read the ordinance to you, 760 feet is correct, "To a point 760 feet west of the west line of a private street known as Alfred Avenue produced."

A. That is correct.

Q. And then it runs north parallel to Kingshighway Boulevard?

A. Thence north, yes, that is correct.

Q. So, that if the line which I have designated as running parallel to Kingshighway Boulevard were extended southwardly to Arsenal Street it would take in a considerable part of Tower Grove Park, would it not?

A. It would.

Q. You know of the strip 200 feet around Tower Grove Park which is reserved for residence purposes?

A. Yes, sir.

Q. Here is a white line which is outside of the dividing line between the district and the park?

A. Yes, sir.

Q. Does this not designate that strip of 200 feet?

A. It appears to, yes, sir.

Q. And this is a part of Tower Grove Park?

A. That is part of Tower Grove Park.

43 Q. But none of this is within the district?

A. No portion of it.

Q. No portion of Tower Grove Park or this strip of 200 feet is within the district?

A. No, sir.

Q. That is correct, is it?

A. That is correct.

Q. There was an ordinance to establish Manchester joint sewer district, have you that plat here?

A. No, sir; I have not.

Cross-examination.

By Mr. Taylor:

Q. This district, we will begin on the south line of the district, it begins on the south of Arsenal Street, does it not?
A. It does.
Q. How far west of Kingshighway Boulevard?
A. It begins at the center line of Arsenal Street.
Q. At what place on Arsenal?
A. About the midway line of Kingshighway Boulevard.
Q. Now, that is a starting point; now, which way then do you run for an eastern boundary of the district?
A. This is the eastern boundary (indicating).
Q. You say the east, do you run north?
A. North, yes, sir.
Q. Along Kingshighway?
A. Along Kingshighway to a certain point.
Q. How far north along Kingshighway do you run?
A. Thence northward along the center line of Kingshighway Boulevard to the south line of Tower Grove Park Addition.
Q. Now, Tower Grove Park Addition is how far north of the north line of Tower Grove Park?
A. That is a distance of about—the distance from the north line of Arsenal Street.
Q. I am talking about the north line of Tower Grove Park?
A. The north line of Tower Grove is 1477.75 feet from Arsenal Street.
Q. From the north line of Tower Grove Park to the——
A. Tower Grove Park Addition is 184.42 feet, that is,
44 from the south line of Magnolia Avenue to the north line of Tower Grove Park, 184.05.
Q. What is the south boundary of Tower Grove Park Addition, Magnolia Avenue?
A. Tower Grove Park.
Q. Wouldn't it be Magnolia Avenue?
A. No, Magnolia Avenue, that is the north line of Tower Grove Park, I mean of Tower Grove Park Addition.
Q. Magnolia Avenue is?
A. Yes, sir.
Q. Then Tower Grove Park Addition, according to your statement is between Magnolia Avenue and Tower Grove Park?
A. Yes, sir; it is.
Q. And is about 184 feet wide?
A. Yes, sir; 184 feet wide and 5 inches.
Q. When the eastern boundary of this district turned eastward from Kingshighway at what point did it turn eastwardly, the boundary, on Magnolia Avenue?
A. No, sir; it turned eastwardly a distance of 184 feet 5 inches south of Magnolia Avenue.
Q. It turned east?
A. It turned east.

Q. The district did?
A. The district did, yes, sir.
Q. Then it turned east on the north line of Tower Grove?
A. Yes, sir; the north line of Tower Grove Park.
Q. Now, I believe you said it ran eastwardly, that line of the district ran eastwardly 760 feet?
A. It would turn eastwardly at that point.
Q. How far eastwardly does that boundary run?
A. Yes, that is what I want to ascertain now; about 681 feet, I think.
Q. East from Kingshighway?
A. East from Kingshighway 680 or 681, somewhere about that.
Q. Then in what direction does that boundary run?
A. Then it runs—I will have to follow the ordinance there, it runs thence northwardly.
Q. How far?
A. To a point 760 feet west of the west line—thence northwardly parallel to a private street known as Alfred Avenue and Alfred Avenue produced and 760 feet of the west line thereof to a point 626 feet north of the north line of Magnolia Avenue.
Q. The length of that line from Tower Grove Park, the north line of Tower Grove Park, that north line at that point was 626 feet?
A. Yes, sir.
Q. Then in what direction does the boundary run?
A. Then eastwardly parallel to Magnolia Avenue, and 626 feet north of the north line thereof to a point 1060 feet west of the west line of a private street known as Alfred Avenue, thence northwardly you want?
Q. Well, go ahead?
A. Thence northwardly parallel to Alfred Avenue and Alfred Avenue produced, and 1060 feet west of the west line thereof to the north line of Shenandoah Avenue.
Q. Go ahead?
A. Thence westwardly on the north line of Shenandoah Avenue to a point 315 feet 3¾ inches east of the east line of Kingshighway Boulevard, thence northwardly in a straight line to a point in the southeast line of Old Manchester Road, there is no distance given there.
Q. Thence?
A. 57 feet 10 3/4 inches northeast of the east line of Kingshighway Boulevard.
Q. Go ahead?
A. Thence northeastwardly on the southeast line of Old Manchester Road to the center line of Accomac Street, thence westwardly on the center line of Accomac Street to a point 192 feet 11 inches east of the east line of Kingshighway Boulevard.
Q. Go ahead, give us the whole boundary?
A. Yes, sir; thence southwardly parallel to Kingshighway Boulevard and 192 feet 11 inches east of the east line thereof to the south line of Accomac Street—hold on, that is wrong, thence westwardly

on the south line of Accomac Street to the east line of Kingshighway Boulevard, that is right, thence southwardly on the east line of Kingshighway Boulevard to the center line of Bischoff Avenue, thence westwardly on the center line of Bischoff Avenue to
46 a point 171 feet west of the west line of Kingshighway Boulevard, thence southwardly parallel with Kingshighway Boulevard 171 feet on the west line thereof to a point 367 feet south of the south line of Bischoff Avenue, thence westwardly in a straight line to a point in the center line of Cooper Street and 171 feet north of the north line of Old Manchester Road, thence eastwardly along the north line of Old Manchester Road to the east line of the St. Louis, Oak Hill & Carondelet Railway Company's right of way, thence southwardly on the east line of the St. Louis, Oak Hill & Carondelet Railway Co. to the center line of Arsenal Street, thence eastwardly on the center line of Arsenal Street to a point 250 feet east of the east line of Brannon Avenue, thence southwardly parallel to Brannon Avenue, and 250 feet east of the east line thereof to a point 200 feet south of the south line of Arsenal Street, thence eastwardly parallel to Arsenal Street and 200 feet south of the south line thereof to a point 900 feet east of the east line of Brannon Avenue, and 250 feet east of the east line thereof, thence eastwardly on the center line of Arsenal Street to a point 250 feet east of the east line of Brannon Avenue, thence southwardly parallel to Brannon Avenue, and 250 feet east of the east line thereof to a point 200 feet south of the south line of Arsenal Street, thence eastwardly parallel to Arsenal Street and 200 feet south of the south line to a point 900 feet east of the east line of Brannon Avenue, thence northwardly parallel to Brannon Avenue and 900 feet east of the east line thereof to the center of Arsenal Street; thence eastwardly on the center of Arsenal Street to the place of beginning. That completes the circuit, that is correct, that is a complete description of the boundary line of the entire district.

By the Court: I don't know that I understand one thing, that portion of this tract that you call 200 feet reserved for residence purposes, is that a part of the park now, or is it used as part
47 of the park, or outside of the park line?

A. No, sir; that is included within the limits of the park.

Q. Is it in the possession of the city and being used as a park?

A. I think so, I don't know whether that is still reserved—that I don't know but I know it is considered as part of the park.

Q. As far as the outside building is concerned?

A. Yes, sir; we assess it for special tax purposes, yes, sir.

Q. But you do not assess it as part of the district for your sewers?

A. No, sir; the whole of it is excluded from *from* that sewer district, that 200 foot strip and the park.

Q. In the assessment of this tax here you have excluded it?

A. Yes, sir.

Q. When you open that for street purposes you include it?

A. Yes, sir; include that as a whole, as part of the park.

Q. Either, I don't understand you or you don't understand me, is there any difference between assessing the special tax bills in this

particular case and assessing street special taxes against that strip reserved for residence purposes?

A. We make no distinction.

Q. It is all treated as if part of the public park?

A. Yes, sir.

By Mr. Goldsmith: Now, let us see, have you not assessed other portions of this strip for district sewers?

A. Yes, sir; we have.

Q. This is the only district in which you have not assessed any part of this strip for district sewers?

A. This portion of this 200 feet or any other portion.

Q. You have assessed other portions of that 200 feet for other sewer districts, have you not?

A. Oh, yes.

Q. You have assessed part of Tower Grove Park itself, including these 200 feet for the Manchester joint district sewer, have you not?

A. I think we have, sir, that I couldn't tell you.

48 Defendants' counsel offered and read in evidence a certified copy of Ordinance No. 21,445, entitled "An Ordinance to establish Manchester Road joint sewer district," and a certified copy of Ordinance No. 21,444 entitled "An Ordinance to provide for the construction of a joint district sewer, in Manchester Road joint sewer district, and to provide for the payment of the City's portion of the cost thereof," same being in words and figures as follows, to-wit:

(21445.)

An Ordinance to Establish Manchester Road Joint Sewer District.

Be it ordained by the Municipal Assembly of the City of St. Louis, as follows:

Section One. There is hereby established in the City of St. Louis, a joint sewer district to be known as Manchester Road Sewer District, bounded as follows, to-wit: Beginning at a point in the west line of Thurman Boulevard, five hundred and one feet north of the north line of Shaw avenue, running thence southwardly on the west line of Thurman boulevard to a point three hundred and thirty feet north of the north line of Shaw avenue, thence westwardly parallel to Shaw avenue, and three hundred and thirty feet north of the north line thereof, to the center of Tower Grove avenue, thence southwardly on the center of Tower Grove avenue and on the center line of Tower Grove avenue produced to the center of Arsenal street, thence westwardly on the center of Arsenal street to a point one thousand feet east of the west line of Kingshighway boulevard, thence northwardly parallel to the west line of Kingshighway boulevard, and one thousand feet east of the west line thereof, to a point seven hundred and seventy feet south of the south line of Magnolia

avenue, thence westwardly parallel to Magnolia avenue, and
49 seven hundred and seventy feet south of the south line thereof, to the center of Kingshighway boulevard, thence southwardly on the center of Kingshighway boulevard to the center of Arsenal street, thence westwardly on the center of Arsenal street to a point nine hundred feet east of the east line of Brannon avenue, thence southwardly parallel to Brannon avenue, and nine hundred feet east of the east line thereof, to the center of Kemper Park, thence westwardly on the center of Kemper Park to the center of Brannon avenue, thence southwardly on the center of Brannon avenue to a point nine hundred and twenty-four feet one and one-half inches south of the south line of Arsenal street, thence westwardly, parallel to and thirty feet north of the south boundary line of city block number forty-seven hundred and thirty-six and said line produced, to a point nine hundred and nineteen feet five and one-fourth inches west of the center line of Brannon avenue, thence northwestwardly in a straight line to a point in the center of Sublette avenue, four hundred feet south of the south line of Arsenal street, thence northwardly on the center of Sublette avenue to the center of Arsenal street, thence westwardly on the center of Arsenal street to the center of January avenue, thence northwardly on the center of January avenue to the center of Reber place, thence eastwardly on the center of Reber place to the center of Old Manchester road, thence northeastwardly on the center of Old Manchester road to the center of Sublette avenue, thence northwardly on the center of Sublette avenue to the center of Bischoff avenue, thence eastwardly on the center of Bischoff avenue to the center of Cooper street, thence northwardly on the center of Cooper street to the center of Shaw avenue, thence eastwardly *of* the center of Shaw avenue to the center of Hereford street, thence northwardly on the center of Hereford street to the center of Pattison avenue,
50 thence eastwardly on the center of Pattison avenue to the center of Kingshighway boulevard, thence northwardly on the center of Kingshighway boulevard to the center of Eager road, thence eastwardly on the center of Eager road to the center of the St. Louis, Oak Hill and Carondelet Railway Company's right-of-way, thence northeastwardly on the center of the St. Louis, Oak Hill and Carondelet Railway Company's right-of-way to the center of McRee avenue, thence eastwardly on the center of McRee avenue to the center of Old Manchester road, thence northeastwardly on the center of Old Manchester road to the center of McRee avenue east, thence eastwardly on the center of McRee avenue east, to the west line of Thurman boulevard, thence southwardly on the west line of Thurman boulevard to the place of beginning.

Approved April 4, 1904.

I, Patrick J. Regan, Register of the City of Saint Louis, hereby certify the foregoing to be a true copy of the original, on file in this office, of an Ordinance passed by the Municipal Assembly of the City of Saint Louis, "entitled" An ordinance to establish Manchester Road Joint Sewer District. and numbered 21,445.

In Testimony Whereof, I have hereunto set my hand, and affixed the seal of the City of Saint Louis, this 9th day of February, 1909.

[SEAL.] PATRICK J. REGAN,
Register.

(21444.)

An Ordinance to Provide for the Construction of a Joint District Sewer in Manchester Road Joint Sewer District, and to Provide for the Payment of the City's Portion of the Cost Thereof.

Be it Ordained by the Municipal Assembly of the City of St. Louis, as follows:

51 Section One. The Board of Public Improvements is hereby authorized and directed to cause a joint district sewer to be constructed within the Manchester Road joint Sewer District, with manholes, junctions and all other appurtenances necessary to render said sewer complete and efficient. Said sewer shall be made and located as follows, to-wit:

A sewer nine feet in diameter, to be made of brick laid in Portland cement mortar, on the alley between Shaw avenue and McRee avenue, from Thurman boulevard westwardly to Lafayette avenue; thence a sewer eight feet in diameter, made of brick laid in Portland cement mortar, westwardly on Lafayette avenue to Old Manchester road; thence southwestwardly on Old Manchester road to Accomac street, thence westwardly on Accomac street to Kingshighway boulevard, thence a sewer seven feet in diameter, made of brick laid in Portland cement mortar, southwardly on Kingshighway boulevard to Bischoff avenue, thence a sewer five and one-half feet in diameter, made of brick laid in Portland cement mortar, westwardly on Bischoff avenue to Cooper street, thence a sewer four and one-half feet in mean diameter, made of brick laid in Portland cement mortar, southwardly on Cooper street to Old Manchester road.

Section Two. As soon as said joint district sewer, with its manholes, junctions and other appurtenances is fully completed, the Sewer Commissioner shall cause the total cost thereof to be computed, and shall certify the same to the President of the Board of Public Improvements, and the President of said Board shall assess it as a special tax against all the lots or parcels of ground in the joint sewer district, in the ratio that the area of each lot or parcel of ground bears to the area of the whole district, exclusive of the area of the streets, avenues, public highways and alleys, and
52 the President of said Board shall cause to be issued a special tax bill against each lot or parcel of ground in the joint sewer district, giving the name of the owner thereof, in favor of the contractor, which shall be registered, delivered, collected and paid as provided in Sections Twenty-four, Twenty-five and Twenty-six

of Article Six of the Charter of the City of St. Louis; provided, however, that the special tax bills above directed to be issued, shall be divided into three equal parts, payable and collectible as provided in Section Twenty-five of Article Six of the Charter of the City of St. Louis.

Section Three. Whereas, in the joint sewer district aforesaid there is located a part of Tower Grove Park, a part of the Insane Asylum grounds, the Female Hospital grounds and the pipe yard of the city Water Department, property of the City of St. Louis, which is not liable to special assessment; and, whereas, the proportion of cost of the aforesaid improvement, which would have been assessed against said property of the city, were the same not exempt from assessment, amounts to thirty-three thousand dollars, there is hereby appropriated and set apart out of the amount appropriated by Section Three of ordinance number twenty-one thousand one hundred and seventy-one, for sewers construction, for joint district sewers and district sewers, city's share of cost, said sum of thirty-three thousand dollars to pay for the city's proportion of said cost.

Approved April 4, 1904.

I, Patrick J. Regan, Register of the City of Saint Louis, hereby certify the foregoing to be a true copy of the original, on file in this office, of an Ordinance passed by the Municipal Assembly of the City of Saint Louis, "entitled" An ordinance to provide for the construction of a joint district sewer in Manchester Road Joint Sewer District, and to provide for the payment of the city's portion of the cost thereof and numbered 21,444.

53 In testimony whereof, I have hereunto set my hand, and affixed the seal of the City of Saint Louis, this 9th day of February, 1909.

[SEAL.] PATRICK J. REGAN,
Register.

Q. Now, the district sewers constructed by the plaintiff, being the district sewers in Manchester Road Sewer District No 3, empty into the Manchester Road joint district sewer, do they not?

A. I believe they do.

Q. Don't you know that to be a fact?

A. No, I don't know that, I am not familiar with the sewer department.

Q. But you have a plat showing it?

A. Yes, sir.

Q. You recognize this as a plat of the City for the Manchester Road joint sewer district?

A. Yes, sir.

Mr. Taylor: Is that a different plat?

Mr. Goldsmith: That is a different plat.

Q. Now, do you recall that the sewers in District No. 3, of which you have spoken, run along Kingshighway up to Bischoff Avenue?
A. Yes, sir.
Q. Don't they empty there into the joint district sewer, that is the Manchester Road joint district sewer?
A. They appear to, yes, sir.
Q. Which sewer runs along Bischoff Avenue?
A. Yes, sir.
Q. That is that joint district sewer?
A. Yes, sir.
Q. Now, was any part of Tower Grove Park included in the district assessed for the Manchester Road joint district sewer?
A. Yes, sir; it appears to be all included.
Q. But it was not included in Manchester Road Sewer District No. 3?
A. It was not, no, sir.
Q. Was not a part of the park and especially this strip of 200 feet included in the other sewer districts surrounding Tower Grove Park?
A. Well, I couldn't tell that without looking.
Q. As far as you know, wasn't that the case?
A. I believe it was but I wouldn't be certain of it.
54 Q. Can you point out on the plat which you have used and which you have designated as the plat of this District No. 3, the property of the defendants?
A. Yes, sir; this is the property (indicating).
Q. The portion bounded on the north by Bischoff Avenue and on the south by Old Manchester Road and on the east by Kingshighway Boulevard?
A. Yes, sir; that is correct, just this portion is included in the district.
Q. The portion designated there?
A. Yes, sir; in the district lines.

ELLERY D. WILLIAMS, sworn for defendants, testifies as follows:

Direct examination.

By Mr. Goldsmith:

Q. State your name to the court.
A. Ellery D. Williams.
Q. What position do you hold in the employ of the city?
A. Draftsman of the sewer department.
Q. How long have you held that position?
A. Five years and a half.
Q. I show you a plat of the Manchester Road joint sewer district and ask you if you have produced that under the orders of the Court, whether the Sewer Commissioner has produced it under the orders of the court?
A. That is a blue print of the map on file in the sewer department.

Q. And that is a blue print of the Manchester Road Joint Sewer District?

A. Yes, sir.

Q. Now, this line broken with dots shows the outlines of the joint sewer district, that is, of the Manchester Road Joint Sewer District?

A. Yes, sir.

The Court: Let me ask Mr. Goldsmith, is that the district in question here?

Mr. Goldsmith: I am immediately going to show that part
55 of Tower Grove Park is included in that joint sewer district; District No. 3 is the one named in the pleadings here, that is the district sewer.

Q. Now, do you know whether or not the sewers in Manchester Road District No. 3 connect with and empty into the joint district sewer in the Manchester Road Joint Sewer District?

A. Yes, sir.

Q. The ones located along Kingshighway run northward to Bischoff Avenue and there empty into that joint district sewer?

A. I think they do, I am not positive of that, they might run down Manchester Road and come in down there.

Q. What is you best impression?

A. I think they come in at Bishoff Avenue.

Q. Bischoff Avenue, the joint district sewer is located in Bischoff Avenue from Kingshighway Boulevard to Cooper Street on the west?

A. Yes, sir.

Q. Now, is not nearly the whole of the western half of Tower Grove Park included in the Manchester Road Joint Sewer District?

A. Yes, sir.

Defendants' counsel offers and places in evidence the plat of the Manchester Road Joint Sewer District, which is as follows, to-wit: (See blue print.)

(Here follows diagram marked page 55*a*.)

BLUEPRINT

TOO

LARGE

FOR

FILMING

Q. These unbroken white lines in the middle of the streets indicate where the joint district sewer is laid?

A. Yes, sir.

Q. The part of Tower Grove Park which is included in this joint sewer district includes the part fronting on Kingshighway Boulevard?

A. Not all of it.

Q. A part I say?

A. A part, yes, sir; you said "the part."

Q. No, I said a part?

A. I misunderstood you.

Q. A small corner in the southwest part of the park is excluded from this district?

A. Yes, sir.

Q. With that exception the whole of the western part of the park is included in the district?

A. Yes, sir.

56 Q. I am speaking now of the joint sewer district?

A. I understand you.

The Court: Do you know why that is included?

Mr. Goldsmith: That will appear, your Honor, he does not know, but that will appear.

Cross-examination.

By Mr. Taylor:

Q. Mr. Williams, did you know the sewer constructed by the plaintiff, the location of the sewer?

A. I only know of it from the map that I have seen.

Q. Do these maps show?

A. Those maps were made up from notes that were turned in by the engineers on the work.

Q. Do you know whether or not the sewer constructed by the plaintiff in Sewer District No. 3 as mentioned, whether any part of the sewer goes east of Kingshighway Boulevard?

A. North of the park there is some territory taken.

Q. I am talking about whether the sewer itself is constructed, any part of it, east of Tower Grove Park?

A. East of Tower Grove Park, no, sir; it would be at Grand Avenue if you went east of the park.

Q. I mean east of Kingshighway Boulevard?

A. There were laterals constructed on the sewers north of Tower Grove Park that run into the sewer at Kingshighway.

Q. From what part of the district do they run in at Kingshighway?

A. I don't remember what street, I think there is one at Magnolia Avenue and one on Shenandoah and one on Botanical, I would have to get a map to be sure of those.

EDWIN JOLLY, sworn for defendants, testifies as follows:

Direct examination.

By Mr. Goldsmith:

Q. State your name?
A. Edwin Jolly.
Q. Are you in the employ of the city?
A. Yes, sir; the street department.
57 Q. In what capacity?
A. Engineer of grades and surveys.
Q. How long has that been your position?
A. About 11 years.
Q. Has the department got a topographical survey showing the grades of Arsenal Street and the adjoining property between Arsenal Street and Bischoff Avenue?
A. Yes, sir; we have a topographical map.
Q. You have produced that here under the subpœna issued to the Street Commissioner?
Q. Yes, sir; he told me to bring it.
Q. Did you prepare any part of that survey yourself?
A. I surveyed Tower Grove Park.
Q. And up to Kingshighway Boulevard?
A. The east line of Kingshighway, Mr. B. H. Colby surveyed west —surveyed the street itself and west.
Q. But you surveyed it up to the east line of Kingshighway?
A. Yes, sir.
Q. That applies to the whole of Tower Grove Park?
A. Yes, sir.
Q. About how far north did you survey it?
A. To the north line of the park, Mr. O. W. Ferguson surveyed that tract north at the time they expected to hold the World's Fair here, at the time they held it in Chicago, and I surveyed the park and surveyed south to the River Des Peres.
Q. But you have been all over this property, that is, that including that surveyed by the other parties?
A. Yes, sir.
Q. You know, do you not, in a general way as to the accuracy of the survey?
A. Yes, sir; I think, though, I will state along Kingshighway, the road itself, probably there were not enough elevations taken by Mr. Colby, to show the shape of the road, he was not as particular about that as I was.
Q. But you did show it all along the front of Kingshigh-
58 way?
A. My survey came up—was inside the park to around the west end of the park.
Q. To the east line of Kingshighway Boulevard?
A. To the east line of Kingshighway Boulevard, yes, sir.

Q. You know the property, as I have stated, in a general way, you have been over it time and again?

A. Yes, sir.

Q. And also over Kingshighway?

A. Yes, sir.

Q. Now, state first in a general way whether there is a rise or fall in the grade of Kingshighway Boulevard as you proceed northward from Arsenal Street to Bischoff Avenue?

A. The established grade falls from Arsenal Street towards the north.

Q. There is a gradual fall?

A. It is established but the road is not quite the grade, it is a little above, that is the road itself.

Q. But the road also, the grade of the road, also falls?

A. Yes, sir.

Q. As you go from Arsenal Street northward to Bischoff Avenue?

A. Yes, sir.

Q. Does not the grade also rise as you proceed from the east line of Kingshighway eastwardly through the park?

A. Rise?

Q. Yes, as you go from Kingshighway Boulevard eastward through the park, in other words is not the park property which is east of Kingshighway higher than Kingshighway?

A. The grade rises, yes, sir; towards the east, there is a sort of small depression, a sag or depression here (indicating the southwest corner of the park).

Q. What do you mean by here?

A. That is at the southwest corner of the park.

Q. How far does that depression extend?

A. It extends, this contour is 114 feet above the city directrix and the end of the contour is about 300 feet from the north line of Arsenal Street; it is very flat in there and the same depression extends up a little further, the next contour is three feet, and that would put it in right there (indicating), it would come like that.

59

Q. How far would it extend if you had taken the entire contour of the depression?

A. It extends to about here (indicating).

Q. About how many feet?

A. About 600 feet, the water flows towards the south.

Q. What is the depth of that depression below Arsenal Street, taking the greatest amount of depression?

A. At Kingshighway you mean?

Q. Yes, sir.

A. Below Kingshighway?

Q. Below Kingshighway I mean, yes, sir.

A. This is a little defective, as I said, Mr. Colby didn't get enough elevations there to show the contour of the street.

Q. Well, I will ask you whether you did not yourself make measurements?

A. Yes, sir.
Q. When did you make them?
A. October 5th, I believe, 1909.
Q. Turn to your own measurements at that time and tell us the results of those measurements—before you do that, however, so that the Court may understand, what is the distance of the front of Tower Grove Park along the east line at Kingshighway Boulevard?
A. The park itself.
Q. Yes.
A. Including that strip?
Q. Yes, including the strip of 200 feet.
A. Including that whole ground that belongs to Shaw?
Q. No, I mean including the strip of 200 feet and the park?
A. This widens out down here (indicating), you mean here?
Q. That is called the 200 foot strip, is it not?
A. Yes, sir; it is 200 here and 200 there but at this corner it widens at Arsenal Street.
Q. Including that strip of 200 feet approximately, what is the extent of the frontage of the park and the strip on Kingshighway Boulevard?
60 A. About 1470 feet, maybe 10 feet more or less.
Q. The first street north of Arsenal Street running parallel to Arsenal Street is what?
A. Odell.
Q. The next street is what?
A. Reber Place.
Q. The next street is Magnolia Avenue?
A. Yes, sir.
Q. And that makes a bend——
A. An offset at Kingshighway.
Q. And then proceeds eastwardly, is that right?
A. Yes, sir.
Q. Now, give us your measurements?
A. October 5, 1909, I took the elevation of the west curb of Kingshighway at the south line of South Reber Place, 112.21.
Q. Explain that to the Court?
A. 112.21 feet above the city directrix.
By Mr. Taylor: What point?
A. The west curb of Kingshighway Boulevard at the south line of South Reber Place.
By Mr. Goldsmith: That is where?
A. At the west curb of Kingshighway at the south building line of South Reber Place.
Q. What do you mean by South Reber Place?
A. There are two, the park is in between, there is a north and south.
Q. You mean there are two streets with a little park between them?
A. Yes, sir.
Q. One is called South Reber Place and the other North Reber Place?

A. Yes, sir.
By the Court: It is really one street?
A. Yes, sir.
Q. Like Flora Boulevard?
A. Yes, sir; I will give you the elevations of the curb or the ground opposite that point.
By Mr. Goldsmith: The ground opposite that point?
A. The ground at the east side of Kingshighway Boulevard.
Q. Opposite this point?
A. Yes, sir; that is 114.6 feet.
61 Q. So that the east line of Kingshighway Boulevard is nearly two feet higher than the west line of Kingshighway Boulevard at that point?
A. Yes, sir; higher than the curb.
Q. In other words the east line of the street is higher than the west line of the street?
A. Yes, sir.
Q. Go ahead?
A. At a point 150 feet north the west curb of Kingshighway, 150 feet north of the north building line of Odell Street, that is 114.02.
Q. What is it on the east side immediately opposite?
A. 115.9.
Q. There the east line of Kingshighway is——
A. A foot and nine-tenths above the west curb.
Q. Odell Street is the first street north of Arsenal Street?
A. Yes, sir; I took the west curb of Kingshighway Boulevard at the north line of Odell Street.
Q. The points that you are going to mention are 150 feet southward of the last mentioned point?
A. Yes, sir.
Q. The west curb of what line?
A. The north building line of Odell Street, it is 115.17.
Q. How is it on the east line?
A. 116.2, one foot higher.
Q. Go ahead?
A. The south building line of Odell Street, west curb, 115.76.
Q. Opposite?
A. 116.3, makes it half a foot higher.
Q. You are away down to Odell Street?
A. Yes, sir.
Q. This is the south building line of Odell Street that you are speaking of?
A. Yes, sir.
Q. The eastern side there is about half a foot higher than the western side?
A. Yes, sir.
Q. Did you make any other measurements?
A. Yes, sir; at a point 65 feet south of the south building line of Odell Street.
Q. What did you find there?
A. That is 116.41, that is the curb.

62 Q. On the western curb?
A. Yes, sir.
Q. What is the east curb at that point?
A. There is no east curb, it is ground.
Q. What is the elevation of that?
A. 117.2.
Q. There it is still a little over a half foot?
A. Eight-tenths of a foot.
Q. Higher on the east side than the west side, is that right?
A. Yes, sir; the ground is higher than the curb.
Q. What other measurements did you make?
A. At a point 150 feet south of the south line of Odell Street the west curb is 117.16.

The Court: What is the necessity of having these items so minutely given?
Mr. Goldsmith: To show the entire front on the east is higher than the west.
The Court: Can't you ask him that question and let him answer it?
Mr. Goldsmith: I want to show how far it extends.
The Court: I have no doubt he can state that.
Mr. Goldsmith: I want to show this depression does not extend as far as has been stated on Kingshighway.

Q. What is it on the east side?
A. 116.7.
Q. That is the first time that you strike the east side lower than the west side?
A. Yes, sir.
Q. That is 115 feet south of Odell Street?
A. Yes, sir.
Q. What is the distance from Odell Street to Arsenal Street?
A. I will have to scale that (referring to map), from Odell to Arsenal Street is about 380 feet.
Q. Now, you have stated that the ground rises as you go eastward from the east line of Kingshighway Boulevard in the park; for what distance does it rise?
A. After it passes this depression it does, a small depression there.
Q. Before we do that what is the difference between the grade of Kingshighway Boulevard and the depth of that depression?
63 A. I don't know whether I have got that or not.
Q. Let me see if I can give it to you here from your map; is not the grade above the city directrix at Arsenal Street and Kingshighway 117 feet?
A. Yes, sir.
Q. What is the depth of this depression?
A. This is the 114 foot contour, it means the points along this line are three feet below those.
Q. The depression is three feet below the grade of Kingshighway Boulevard at that point?
A. Yes, sir; about that, the bottom depression here is more.

Q. How much more about?
A. About two feet more.
Q. The greatest depth?
A. Yes, sir.
Q. Now, with the exception of that depression the whole of Kingshighway Boulevard is above the grade of Kingshighway?
A. How is that?
Q. With the exception of this depression the whole of Tower Grove Park, the western part of Tower Grove Park, is above the grade of Kingshighway Boulevard?
A. Yes, sir; when you get away about 300 feet east of Kingshighway at this point, about Odell Street, the ground begins to rise, it is about the same elevation that it is in Kingshighway.
Q. What is the same elevation?
A. The ground.
Q. Doesn't it rise as you go eastward?
A. Yes, sir; 300 feet east, the grade is about the same as Kingshighway.
Q. You mean for a distance of 300 feet eastward opposite Odell Street the ground remains stationary at 117 feet?
A. No, sir; it is below 117, it is between 114 and 117, but 300 feet east this ground is between 114 and 117.
Q. How far eastward does this depression spoken of extend?
A. At Odell Street?
Q. Yes?
A. The middle of the depression is about 200 feet from the east line of Kingshighway.
Q. How far is the east line of the depression?
64 A. It begins to rise gradually from there to a point at the top of the hill.
Q. What is the elevation at the top of the hill?
A. About 600 feet east of the east line of Kingshighway.
Q. What is the elevation?
A. Opposite Odell?
Q. Yes.
A. 124 or 5 feet.
Q. About seven feet above the grade of the street?
A. 115.6 is the established grade, it would be about 9 or 10 feet.
Q. That is at Odell Street?
A. Yes, sir.
Q. North of Odell doesn't the whole of the park property rise as you go eastward?
A. Yes, sir; when you get to Reber place it ascends gradually towards the east.
Q. Does it not sometime before you get there?
A. The head of this sag is right here, at the south side of the entrance you go right up over the road and rise towards the east.
Q. Reber Place is the center of Tower Grover Park approximately?
A. Practically, yes, sir.

Q. Then, there is no depression at all, it rises from the street as you go eastward?

A. Yes, sir.

Q. What is the extent of the rise there, what is the elevation at Kingshighway Boulevard?

A. The established grade is 112.

Q. What is it on the hill?

A. At the top of the hill it is about 600 feet.

Q. You mean it is 600 feet eastward from Kingshighway?

A. Yes, sir.

Q. What is the difference between the top of the hill and the grade of the street?

A. About 18 feet.

Q. Isn't that true for the whole of the rest of the park, the whole of it rises to the top of the hill and the top of the hill is about eighteen feet higher than the grade of the street?

A. It amounts to more down here.

Q. It is at least eighteen feet?

A. Yes, sir.

Q. What is the distance from Reber Place to the north
65 line of the park, can you tell us?

A. I will have to scale that, including that 200 foot strip?

Q. Yes, sir; including the 200 foot strip.

A. About 530 feet.

Q. From where did you measure?

A. From the north line of North Reber Place to the north side of this 200 foot strip.

Q. Doesn't the elevation commence to rise before you get to the north line, doesn't it begin to rise at the south line of Reber Place, dosn't the grade commence to rise regularly as you go eastward?

A. From about the south line of Reber Place.

Q. What is the distance from the south line to the north line of the park property?

A. About 660 feet.

Q. You know where the central entrance is to Tower Grove Park from Kingshighway?

A. Yes, sir.

Q. That is opposite what street?

A. Reber Place.

Q. Directly opposite?

A. Yes, sir; Reber Place seems to be in the center according to this map.

Cross-examination.

By Mr. Taylor:

Q. How far from the eastern boundary of Kingshighway Boulevard, going into the park, does this depression begin or does it begin right there?

A. It begins just about the corner there. The original map showed the elevations taken all over the ground. I probably should have brought that along, it is in the street department.

Q. In a general way the depression begins where?
A. Just about the south side of the entrance to the park.
Q. The south side of the entrance to the park on the west side of the park?
A. Yes, sir; that entrance is about 200 feet wide, it shows on the city map, about 200 feet wide, the iron fences or stone fences are like this, rounded, but the fence back of those and that entrance shows about 200 feet across.
Q. That is the width of the entrance?
A. Yes, sir; that is the width of the entrance.
66 Q. What I am asking is with reference to the depression in the park, does the depression begin as soon as you enter the park from the west?
A. It begins right here (indicating).
Q. Right at the east line of Kingshighway?
A. Right at the east line of Kingshighway and the south side of the entrance.
Q. And how far into the park does it extend?
A. Maybe 10 feet, it begins right there at the corner.
Q. How far does it go into the park?
A. It runs diagonally like that (indicating).
Q. I understand, how far into the park does that depression extend?
A. The center of the depression?
Q. Yes.
A. At Arsenal Street *is* is about 250 feet east of the east line of Kingshighway.
Q. The center of the depression?
A. The center of the depression, it starts here and runs there.
Q. That depression is about five feet below the general surface of Kingshighway?
A. No, only at Arsenal Street, the north line of Arsenal Street.
Q. At the center how deep is it about?
A. At this point (indicating)?
Q. Yes.
A. That would be about Odell Street, the established grade is 115.6, and the ground, I should imagine, opposite that point in the center is about 115, the road itself had macadam put on it and is higher than the established grade.
Q. The road that is made there in the park is higher than the general surface?
A. Higher than the established grade.
Q. And higher than the surface of the ground?
A. Yes, sir.
Q. About how much higher?
A. I didn't take that.
By Mr. Goldsmith: What are you speaking of?
A. The railroad track there.
Q. Of what?
A. The center of Kingshighway, I didn't take it.

67 By Mr. Taylor: I am speaking with reference to the main roads in the park, the driveways in the park?

A. Here are the driveways in the park, they run like that (indicating).

Q. On which side of those driveways is the general surface of the ground higher or lower?

A. On the west side the ground is lower, the east side higher.

Q. On the west side of what?

A. On the roads the ground is lower, on the east side the ground is higher.

Q. How far into the park is that the case?

A. The roads begin to separate about 300 feet from the east line of the park and the ground rises from Kingshighway to that point.

Q. Is the decline, that is, this drain or depression, is the decline from about where you have described, its beginning, down to the south side or towards Arsenal Street gradual or not?

A. Yes, sir; it is very flat in there.

Redirect examination.

By Mr. Goldsmith:

Q. You are not speaking of the grade of the street, you are talking of the depression?

A. Of the depression.

Q. That depression does not extend beyond the south line of Reber Place?

A. The ground runs each way from there and towards the north and towards the south, the original grade, if it had not been disturbed, went around this way, and this was the point where the water would as soon run towards the north as the south, at Reber Place.

Q. But north of that line all the park property is above the grade?

A. Yes, sir.

Q. And it rises still more as you go eastward?

A. Yes, sir.

Q. Until there is a difference of eight or ten feet between Kingshighway Boulevard and the top of the hill?

A. Yes, sir; there is more than that, here is 129 and 107, about 22 feet.

68 Q. To take the distance given by you at 150 feet south of Odell Street, the grade of the eastern curb is 117.16, whereas on the south building line of South Reber Place the grade of the western curb on Kingshighway is only 112 feet?

A. 112.21, I believe.

Q. So that between these two points the grade of Kingshighway falls four feet?

A. 112.21 and the other one was 117.16.

Q. So that the grade falls approximately four feet in that distance?

A. 4.9 feet about.

Q. And the grade continues to fall as you go farther north?

A. Yes, sir.

Q. Take the grade of Old Manchester Road, which is the southern line of the defendants' property, isn't that grade higher than the grade at Bischoff Avenue, which is the northern line of defendants' property?

A. The established grade—the grade is higher here at Old Manchester than at Bischoff.

Q. The defendants' property also slopes towards the north, that is the elevation on the northern side is less than the elevation on the southern side?

A. Yes, sir.

Q. Or to put it otherwise the elevation on Bischoff Avenue is considerably less than the elevation at Old Manchester Road?

A. Yes, sir; about six feet.

Q. There is six feet difference in elevation between those two points?

A. In the natural grade, yes, sir; I don't know about the established grade.

By Mr. Taylor: The northern part of the park proper, Tower Grove Park, is higher than the southern part?

A. At what point?

Q. From the entrance just near the center of the park, isn't it?

A. Yes, sir; the center of the west end of the park.

Q. How is the northern part of the park at that point as to altitude?

A. The top of the hill there is 129.

By Mr. Goldsmith: Where is it 129?

A. On that 200 foot strip north of the park about 600 feet away, about 500 feet east of the east line of Kingshighway.

69 By Mr. Taylor: It is above 129?

A. Yes, sir; it was 129 at the last contour, the contour numbers are exactly divisible by three.

Q. In general terms that is higher than the southern part of the park, isn't it?

A. On that same hill, at the south line it is about 129, there is a sag in between, a water shed in between, on that hill there is a saddle.

Q. How deep is it?

A. It is about six feet, the elevation of the saddle is below 123 and the ground at each side of this ridge at the north and the south line is about 129, the elevation of this saddle is less than 123.

By Mr. Goldsmith: Take the park property at the top of the hill from a point opposite Reber Place to the north line of the park property, isn't it steady at 129?

A. Yes, sir.

Q. There is no sag there?

A. It is above 129 and this (indicating).

Q. By this you mean the point opposite Reber Place?

A. Yes, sir.

Q. And by the other you mean the point opposite Magnolia Avenue?

A. Yes, sir.
Q. They are about the same?
A. Yes, sir.
Q. But on Kingshighway the elevation is less at Magnolia Avenue than it is at Reber Place, is it not?
A. Yes, sir.
Q. Considerably less?
A. Yes, sir; about five feet less, the established grade.
Q. That is less?
A. Yes, sir; 4.8.
Q. At Magnolia Avenue than at Reber Place?
A. Yes, sir.

CARL M. VETSBURG, sworn for defendants, testifies as follows:

Direct examination.

By Mr. Goldsmith:

Q. Your name?
A. Carl M. Vetsburg.
Q. Your occupation?
A. Lawyer.
70 Q. Your age?
A. 31.
Q. Did you go with me this week to the western part of Tower Grove Park to examine the sewers there, the sewers in the street?
A. I went there twice this week.
Q. On what days?
A. On Monday and on yesterday.
Q. Was I with you both times?
A. Both times.
Q. Was any examination made of any sewers in the park property along the western border?
A. Yes, sir.
Q. What did we find there, just describe what sewers——

Plaintiff's counsel object to the question as incompetent; objection overruled.

A. You want the sewers in the park?
Q. Yes, sir.
A. There are gullies on either side of the road, gullies or gutters leading from the park along this elevation out into Kingshighway, there is just north, not just north, a little north of the western entrance at Tower Grove Park, a hydrant which has a sewer.
Q. Where is the hydrant?
A. That hydrant is possibly 50 or 100 feet north of the entrance to the park there.

By Mr. Taylor: On Kingshighway?
A. In the park just north of the guard house at the gate of the park, northeast of the guard house, there is a hydrant there, and a little south of that hydrant there is a fountain which has a drain

in it or at the bottom of it, there are pipes crossing the roads there on either side of the walks which are—on the walks on either side of the road, pipes which apparently drain the surface waters into these gutters which drain out into Kingshighway.

By Mr. Goldsmith: And what is there in Kingshighway along the eastern line of the road in the way of sewers?

A. There are inlets in these gutters, just as the gutter on each side of the road turns into Kingshighway there are inlets or openings allowing the water to go down; also one along the gutter
71 along the east line of Kingshighway north almost to Magnolia Avenue or close to Magnolia Avenue, and at the northern end of that gutter there is an inlet. In the middle of Kingshighway there is a row of trees separating the driveway from the highway proper where the street car runs, and there is another gutter just east of that line of trees and across the plot there at the northern edge of which there is also an inlet, an opening, into which water flows down.

Q. Have you made a plat showing where those inlets are located?

A. I have made a rough drawing of it here, yes, sir.

Q. This shows the inlets this sketch?

A. Yes, sir.

Q. These square places show the location of the inlets?

A. Yes, sir.

Q. Now, then, there is a gutter along the east line of Kingshighway Boulevard, or, rather, two gutters?

A. Yes, sir; one is on the east line and one is in the center where there is a grass plot and trees.

Q. What is the natural drainage into these inlets?

A. It is from the south north.

Q. The natural drainage is northward into these two inlets?

A. There is a grade down to the north.

Q. I will call these inlets A and B so as to distinguish them from the others; from what distance on Kingshighway Boulevard does the water drain in these gutters into the inlets?

A. This gutter which ends here with the inlet A starts at Odell Street, I don't know just what the distance is.

Q. And the one that enters into inlet B?

A. Also at about Odell Street.

Q. There two inlets are on the southern line of the entrance to the park about?

A. Right near the southern line of these driveways, yes, sir.

Q. The driveway is the driveway into the central entrance of the park?

A. Yes, sir.

Q. This driveway is opposite Reber Place?

A. Yes, sir.

72 Q. Now, then, does any water shed drain from the park into inlet A?

A. This whole gutter on the south line of the drive drains down in that way and there is also an opening in the gutter at which you

could see the pipe that runs under the walk on the south side of that drive way which apparently carries off the surface waters into the gutter.

Q. From where?

A. On that part of the park south of the entrance.

Q. These pipes are in the park?

A. Yes, sir.

Q. Take the northern part of the park property that has a frontage on Kingshighway Boulevard, are there any inlets there?

A. There is an inlet corresponding to A which is on the opposite side.

Q. We will call that C; now, what drains into inlet C?

A. There is a similar drain on the other side, a gutter running from inside the park along the roadway.

Q. And these pipes?

A. There is a pipe there also that drains into the gutter.

Q. You have two more inlets here which I will call D and E and so marked on the sketch, what drains into them and where are they located?

A. These are located on the east line of Kingshighway somewhat south of the intersection of Kingshighway and Magnolia Avenue, somewhat south.

Q. About how far?

A. Oh, I should say, possibly, 75 to 100 feet.

Q. South to Magnolia Avenue?

A. South to Magnolia, yes.

Q. What drains into D?

A. Well, there is an elevation in the park here, it is higher, there is a gully running along the hydrant here and anything that runs into the gully drains down there apparently.

Q. E is about opposite that, further in the street?

A. Yes, sir; it is on the line of the B inlet, along that line of trees or grass plot almost opposite, slightly north I think.

73 Q. Almost opposite north of D and on a line with B?

A. Yes, sir.

Q. What drains into that?

A. The road waters I should say that run on the road from that point opposite C here.

Q. Is there a gutter there?

A. A similar gutter, yes, sir; a stone gutter.

Q. Now, did you make any experiments to see whether—you say there is a hydrant in the park?

A. Yes, sir.

Q. Where is the hydrant situated?

A. It is almost due east from this inlet C inside of the park.

Q. About how far east of C?

A. Well, I don't know the exact distance, probably 150 feet.

Q. Now, were any experiments made to ascertain whether this hydrant drained into inlet C under ground?

A. Yes, sir.

Q. State what was done?

A. Well, you can see the bottom of the inlet there and the waters there was stationary and we then started the pump running.

Q. You mean the hydrant?

A. The hydrant running, and the water almost immediately afterwards started to flow into this inlet C and was visible there.

Q. Did it enter in inlet C underground?

A. Yes, sir; underground.

Q. Now, then, did you stop flowing the hydrant?

A. We stopped flowing the hydrant and then there was no more water running into inlet C.

Q. Did you try that several times?

A. I think we tried that twice, yes.

Q. And each time, immediately after you started the hydrant the flow into the inlet began and as you stopped it the flow stopped?

A. Yes, sir; almost immediately, just the time it would take the water to run down.

Q. Could you see the water flowing into the inlet under the surface of the ground?

A. Yes, sir.

Q. Now, did you make any experiments to see how the water flowed from that inlet?

A. Yes, sir.

74 Q. What did you do?

A. While the water was running in there pieces of paper were dropped in there—well, the first time it was done, we saw it from the bubbles and later with the paper, pieces of paper were put in there and the course that they took was followed.

Q. How did the papers flow?

A. The papers owed out of that inlet almost due west, just a trifle north, but almost due west across the highway.

Q. Into the street?

A. Yes, sir.

Q. Could you see the paper disappear?

A. We saw the paper travel in that westerly direction and then disappear.

Q. It was carried farther underground by some further connection?

A. Yes, sir; apparently.

Q. Now, did you drop any paper into this inlet B—or rather into the inlet A to show how the water flowed there?

A. Yes, sir; we dropped papers in there and poured water in the gully and into the opening to force it to flow through.

Q. How did the paper go?

A. In the same general direction, west.

Q. Out towards the street?

A. Out towards the street.

Q. Are there manholes in the street to show where the sewers are laid?

A. There is a manhole in Kingshighway almost at the center of Reber Place opposite the park and there is another manhole in the

Q. Were these spots and streaks like the discoloration produced when you used the rags at the outset?

A. Yes, sir; the same character of stain.

Q. Did these appear before you put in the copperas water and applied the tannic acid?

A. No, sir.

Q. Now was water running through the sewer, other water than the copperas water, at all times that you have mentioned?

A. Yes, sir; you could hear water trickling through the sewer at those two manholes, one opposite Reber Place and at Magnolia Avenue G and F.

Q. Could you see the water proceed at Reber Place?

A. Yes, sir; you could see it flowing along there at Reber Place.

Q. What further experiments were made?

A. An experiment was made from the other side of the road from the manhole A.

Q. What was done?

A. A bag was placed in manhole F and allowed to remain in there about 10 minutes, and then—no, that bag was first filled with, not filed, but a quartity of the tannic acid in powdered form was poured into that bag, a slit was made in that and the tannic acid
78 was dropped in that bag and then the bag was tied up at the top again to close the opening that had been made allow the tannic acid to go in, that was dropped in the manhole F opposite Reber Place there or at Reber Place.

Q. Go ahead?

A. And allowed to remain there for ten minutes and then that was taken up to see what its condition was.

Q. Was the water flowing all the time this bag was in?

A. Yes, sir; it could be heard and seen there.

Q. When you took out that bag did it show any discoloration?

A. Yes, sir; it showed a greenish and yellowish discoloration from the tannic acid.

Q. Did it show any discoloration similar to that produced by the combination of copperas and tannic acid?

A. No, sir; no discoloration of that kind at all.

Q. Then what was done?

A. The bag was put pack into the same manhole and another solution of the copperas water was dropped in at manhole A and a little fresh water poured in afterwards to help wash it down the sewer.

Q. Well, then what?

A. And then after a short while this bag at first was allowed to lie flat at the bottom and then it was hauled up and allowed to remain in the sewer for a while and then taken up.

Q. That was after you poured in the copperas water?

A. After I poured in the copperas water, about five minutes, I should say.

Q. Then, what was done?

A. The bag was taken out of the sewer and we examined it.

Q. What did it show?

A. It showed decided purple-back stains around where the bag was tied together and where the tannic acid in powdered form was poured in.

Q. Were those stains similar to the ones produced by the combination of the copperas and tanic acid on the rags?

A. Yes, sir; the same character of stains.

Q. Were those stains on the rags before you poured in the copperas water into inlet A?

A. No, sir.

79 Q. What is there on the west side of Kingshighway Boulevard opposite these various inlets of which you have spoken?

A. There are houses opposite there, opposite inlet A and opposite inlet C, both of them.

Q. Assuming that the waters from these inlets A and C flowed out into the street as you have stated, was there any possible outlet for them other than this sewer that was laid in Kingshighway Boulevard?

A. No visible outlet, no, sir.

Q. Where are the houses located on the west side of Kingshighway Boulevard?

A. I don't understand the question.

Q. Where are they located?

A. They are located—they run along Kingshighway there, face Kingshighway.

By Mr. Taylor: Face Kingshighway?

A. Face Kingshighway.

By Mr. Goldsmith: Are there a number of them?

A. Yes, sir; quite a few.

Q. Are they opposite these inlets?

A. Yes, sir; about opposite them, right along there, almost exactly opposite.

Q. If the connections from inlet A or inlet C crossed the street entirely would they run into these houses?

A. I should say they would go into the basement of these houses, I should judge that, of course I have no knowledge on that.

Cross-examination.

By Mr. Taylor:

Q. These inlets are all on the east side of Kingshighway, are they?

A. Well, some of them are in the middle of Kingshighway, there is a lot along the east line of part of Kingshighway which I think is about——

Q. But none of them are on the west side?

A. None of them on the west side.

Q. Are there any of them west of the center of Kingshighway?

A. Some of these are near the center, whether they are west or east of the center I don't remember.

Q. You never found any of this copperas or these bags
80 in the sewer constructed on the west side of Kingshighway, did you?

A. I have never found any?

Q. Yes?

A. We put them there.

Q. Did you put them in the sewer, district sewer?

A. Yes, sir; in the sewer that runs in Kingshighway, that is, in the manhole in Kingshighway opposite Reber Place, that is where the bags were put, only there and the one at Magnolia Avenue.

By Mr. Goldsmith: Those are the manholes in the street?

A. Yes, sir; they are west of the car tracks in Kingshighway.

By Mr. Taylor: You put the bags down in the manholes in the street?

A. Yes, sir.

Q. That is you put the copperas in the inlets, did you?

A. In the gutter.

Q. And then you determined from the color of the bags that the essence or substance of the copperas had stained the bags?

A. Yes, sir; the two chemicals coming together produced that effect.

Q. Produced the stain on the bag?

A. Yes, sir.

Q. You didn't do that all by yourself?

A. No, sir; Mr. Goldsmith and I did it.

Q. Who dropped the copperas in?

A. We both turned over the package together, it was a very large package, we carried it out together.

Q. You know nothing as to when these inlets were constructed, do you?

A. No, sir.

Redirect examination.

By Mr. Goldsmith:

Q. Could you see the depth of the inlets along the east side of the street which are marked A, B, C, D and E?

A. Well, you could see water standing in them.

Q. When the water flowed out after you put in water was the flow above the water which was stationary in them?

A. Yes, sir.

Q. In other words, it went out on the western side a little above where the top of the water was which was stationary?

A. Yes, sir; at A. the water that was stationary had been
81 frozen and the water was poured in and flowed out into the sewer above the frozen water and water that was standing there.

Q. And the other water that was stationary, could you see it flow out above where it was before you poured in the water?

A. Yes, sir.

Q. What was the depth of the water that was stationary in these

inlets before you poured in any water, about how far was it below the surface?

A. I should judge a couple of feet.

Q. About how many feet?

A. Probably two or three feet, I don't think it was more than that.

Q. How far was the exit about?

Plaintiff's counsel object to the question.

Q. How deep was the sewer approximately at F and G, that is where you put in the bags at the manholes?

A. Well, I should judge it was about from 12 to 15 feet.

Q. Was it greater or less than the depth of the water and of the exits in the inlets along the east side of the street?

A. Very much greater.

By Mr. Taylor: The depth was greater?

A. Yes, sir.

JAMES A. HOOKE, sworn for the defendants, testifies as follows:

Direct examination.

By Mr. Goldsmith:

Q. State your name?

A. James A. Hooke.

Q. Your occupation

A. Assistant sewer commissioner.

Q. Of the City of St. Louis?

A. Yes, sir.

Q. How long has that been your occupation?

A. Since June or July, I think it was, 1905.

Q. What work did you have under your charge?

A. Since that time?

Q. Yes.

A. Well, all the sewers that have been constructed, since that time have been under our supervision.

Q. This sewer in Manchester district No. 3 was constructed since that time, was it not?

82

A. I think that was under contract when I took office.

Q. It was being constructed?

A. I think they were at work on it at that time, that is my impression.

Q. You have heard Mr. Vetsburg's testimony?

A. Yes, sir.

Q. Assuming that the inlets on the east side of Kingshighway Boulevard of which he has spoken are connected with a drain into the sewers, district sewers, those in Kingshighway Boulevard being the district sewers in Manchester Road District No. 3, can you tell us when that connection was made?

A. I cannot.

Q. Do you- office files show when that connection was made?

A. Not to my knowledge, I don't know that there was a connection made.
Q. You don't know anything about it?
A. No, sir.
Q. You can't tell whether it was made at the time the sewers were constructed or later or at any time?
A. I have no knowledge of it being made at all.
Q. Assuming it was made can you give us any idea, as to when it was made?
A. I could not.
Q. Does your office contain any records as to when the connection was made?
A. Not to my knowledge.
Q. Have you looked to see?
A. No, I have not.

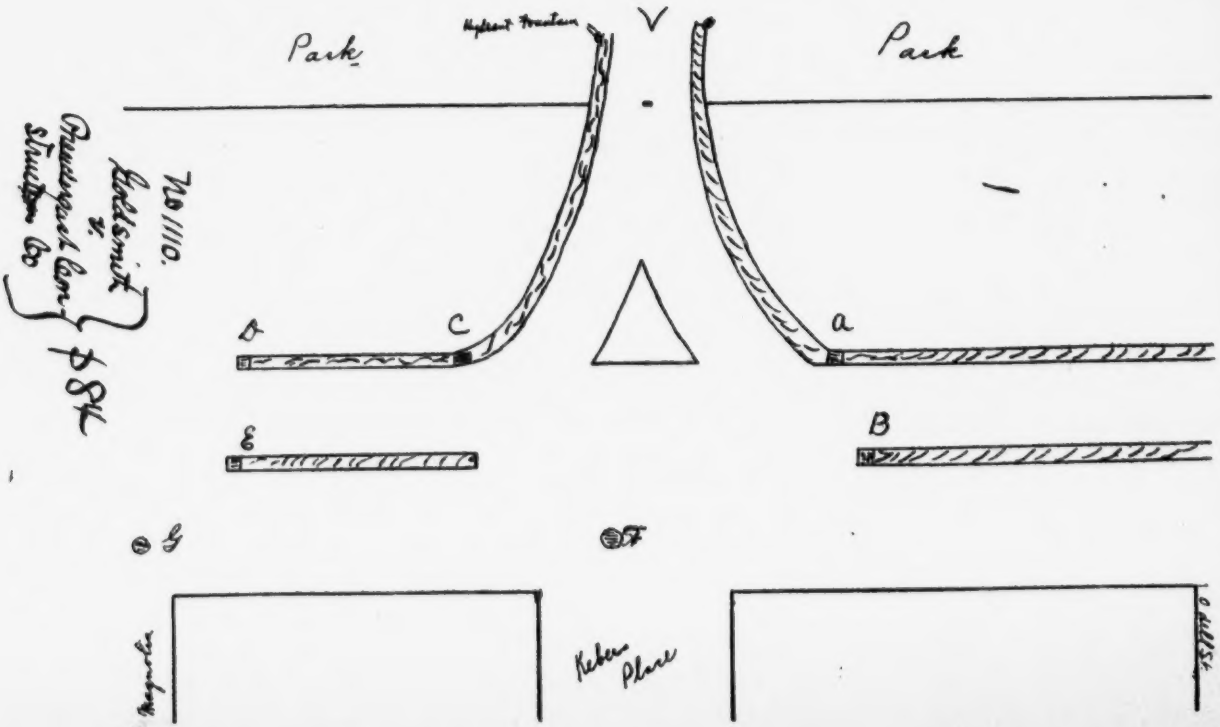
Cross-examination waived.

EDWIN JOLLY, recalled, further testifies, as follows:

Direct examination.

By Mr. Goldsmith:

Q. You know this Tower Grove Park, of course, do you not?
A. Yes, sir; I am familiar with the ground.
Q. Do you know of the sewer inlets of which Mr. Vetsburg has spoken?
A. Yes, sir; I have seen them here, the ones connected that collect the water from the park, they are all the oldest.
Q. How long have those been in existence?
A. They were there when I came to the city about 20 years ago, when I was surveying them in 1891.
83 Q. And the water from the park flowed into them during all that time?
A. Yes, sir; they were there at that time.
Q. Has any change been made in them to your knowledge?
A. I don't know.
Q. I say, do you know of any?
A. No, sir; I don't know of any change, I located the gutters at that time of all the roads.
Q. And the gutters drain the park into Kingshighway and into these inlets, do they not?
A. Yes, sir; there were inlets along the stone walls.
Q. And that, you say, has been the case for 20 years?
A. They were there in 1891 when I surveyed, yes, sir.
Q. Do you know whether, prior to the construction of these sewers, these inlets emptied into an open gully on the west side of Kingshighway?
A. I don't know where they emptied.
Q. There is no such gully there now, is there?
A. No, I think there is a curb along there and that curb might


Park
Highest Mountain
V
Park
No 1110.
Goldsmith
v.
Pavement Const. Co
D & H
F.L.
D
C
a
E
B
G
F
Kelsey Place

have been there at the time, 1891, I don't know when that curb was built.

Q. Is there any visible outlet for those inlets today other than the sewer constructed in Kingshighway Boulevard?

A. I don't know where the water goes, it goes under the ground.

Q. Is there any visible outlet for it?

A. Not unless they run it into a pipe that runs through there towards the north or south.

Q. You don't know whether they do or not?

A. No sir; I don't know what they do with the water but I have seen those inlets all through the park.

At this point court adjourned until 11 A. M., January 6th, 1911.

Pursuant to adjournment, as above stated, on January 6th, 1911, court met and the hearing of the case was resumed.

Defendants' counsel offers and places in evidence the plat of sketch referred to by Mr. Vetsburg, same being as follows:

(Here follows diagram marked page 84.)

85 Also a certified copy of a deed from Henry Shaw to the City of St. Louis, dated October 20, 1868, together with the plat attached thereto, same being in words and figures, as follows:

[U. S. Stamp. $25. H. S., Oct. 20, '68.]

Whereas, the General Assembly of the State of Missouri did pass an act, which was approved the 9th day of March, 1867, "Entitled" An Act to create, establish and provide for the government of the Tower Grove Park of the City of St. Louis, the object of which was, to enable the City of St. Louis to receive from Henry Shaw a donation of land for the purposes of a Public Park, upon the conditions, that said Shaw might attach thereto, to provide means for laying out and embellishing the same, improving the roads adjacent thereto and leading to it, and to provide for the government, care and keeping up of said Park in the future, and whereas, the said Shaw is entirely willing so to donate said land upon the condition, that such sums of money shall be expended by the City in the laying out, embellishing and beautifying said land so given, as shall be necessary in order to carry out the objects contemplated and also the proper keeping up of said Park, after it shall have been laid out, and that a strip of land included in the land so given, two hundred feet wide on the external boundaries thereof with openings or passage ways through the same to the Park as laid down on the plat accompanying this deed and forming a part thereof, shall for all time to come be kept, leased, upon long leases for Villa residences to make not only a source of ornament to said Park, but a source of revenue. Now, Therefore, this deed made this twentieth day of October, eighteen hundred and sixty-eight by and between Henry Shaw, of the City of St. Louis, party of the first part and the City of St. Louis, party of the second part, Witnesseth: That the said party of the first
86 part in consideration of the covenants and agreements herein entered into on the part of said party of the second part, and upon the conditions herein mentioned, does hereby grant, alien and convey into the said party of the second part, a certain tract or parcel of land, situated partly in and partly beyond the present limits of the City of St. Louis and containing 276.76 acres, more or less, being all that tract of parcel of land lying between Grand Avenue on the east, Arsenal Road on the south, Kings road or Highway on the west, and Magnolia Avenue on the north, as at present extended from Grand Avenue to Tower Grove Avenue, and thence from Tower Grove Avenue westwardly in the line of said Magnolia Avenue, extended to a point intersecting the east line of land belonging to the late Thomas Jefferson Payne, thence south along the east side of said land to the Southeast corner of said Payne's land, and from the last named point westwardly along a line separating said Payne's land from the land of the grantor to the King's road aforesaid. To Have and to Hold the same unto the said City of St. Louis in absolute property in fee so long, as the said City shall perform and comply with the following conditions, annexed to said grant, to-wit: First that all of said tract of land hereby conveyed, except the afore-

said strip, two hundred feet in width shall be and remain and be used and managed as a public park for the health, well being and enjoyment of the citizens of said City and the County of St. Louis, forever. That no portion of said park shall ever be used for any other purposes, than those appertaining properly to such public Park, nor shall any revenue ever be raised from the use of any portion of the said Park, except such as may be consistent with its said purpose and use, and which revenue shall go to the maintenance of said Park through the Board of Commissioners. Second: That the City of St. Louis shall within — months, from the date hereof pay
87 over the proceeds of the bonds of the City of St. Louis authorized to be issued by the ninth section of said act, and already sold to the Board of "The Commissioners of The Tower Grove Park" as mentioned and authorized to be formed by the second and third sections of said act, which said Board as authorized by said act, shall be composed of the said Shaw and of the following persons by him now selected and named therefor, to-wit: Adolphus Meier, Wm. F. Ferguson, Charles P. Chouteau and James S. Thomas. Third: That after the money so raised by the sale of said bonds shall have been expended in the laying out and embellishing and constructing said Park, there shall be expended each year the sum of Twenty-five Thousand Dollars in special funds in the keeping up, maintaining and improving the said Park. Fourth: That the provisions of said act as to construction, appointment and the filling of vacancies in the board of the Commissioners of said park shall forever remain inviolate. Fifth: That the Board of Commissioners of the Tower Grove Park shall from time to time cause to be leased the said strip of land of 200 feet in width so surrounding said Park in convenient lots not to exceed 200 feet in front, nor less than 100 feet in front, to any one person for periods of 30 years, before renewal, for the purpose of erecting Villa residences thereon only, and all the gross rents, received from said leases, without deduction, shall be forever paid over to said Henry Shaw, and to his heirs, executors, administrators and assigns, so that he and they shall forever enjoy said rents, and said City shall execute the proper leases therefor, which shall contain a clause, that there shall be only one residence on each tract so leased. And whereas, by said Act of the General Assembly, the City of St. Louis is authorized to purchase land adjoining the property hereby conveyed, to form part of Tower Grove Park, it is hereby understood and expressly agreed
88 that if said City shall hereafter purchase for the aforesaid purpose the parcel of land, owned by the heirs of the late Thomas Jefferson Payne, bounded west by the Kings Highway and north by Magnolia Avenue as intended to be extended in a right line to the Kings Highway the said strip of land of two hundred feet in width hereinbefore mentioned, as far as the same may adjoin said land of said Payne shall be used for said Park and a like strip of land to be taken from said land purchased as aforesaid from said Payne shall be substituted therefor for said leasing purposes, so that the said strip of two hundred feet in width, to be leased as aforesaid,

shall surround said Tower Grove Park so extended in the northwestern corner thereof. It is hereby expressly provided and this conveyance is made upon the express condition, that if said conditions upon which said conveyance is made or any of them shall be violated in the life time of said Henry Shaw, the said property and all improvements thereon, shall at once revert to said Shaw, and absolutely vest in him in fee, as if the conveyance had not been made and if said conditions or any of them shall be violated after the death of said Shaw, then the said estate hereby conveyed and all improvements thereon shall go to and be vested in Whomsoever said Shaw may appoint for the use of the Missouri Botanical Garden, or directly in said Garden, whenever the same is incorporated or authorized by law to hold directly in its own name and for its own use. The said party of the second part hereby covenants to and with said party of the first part that they will perform and fulfill the conditions and agreements hereinbefore mentioned. In testimony whereof the said party of the first part has hereunto set his hand and seal and said party of the second part has caused the same to be signed by its Mayor and countersigned by its Register and its corporate seal to be hereto attached, the day and year first aforesaid.

Stamp paid
Barton Able

89

HENRY SHAW, [SEAL.]

[SEAL.] JAMES S. THOMAS,
Mayor.

Attest:
I. W. HEATH,
City Register.

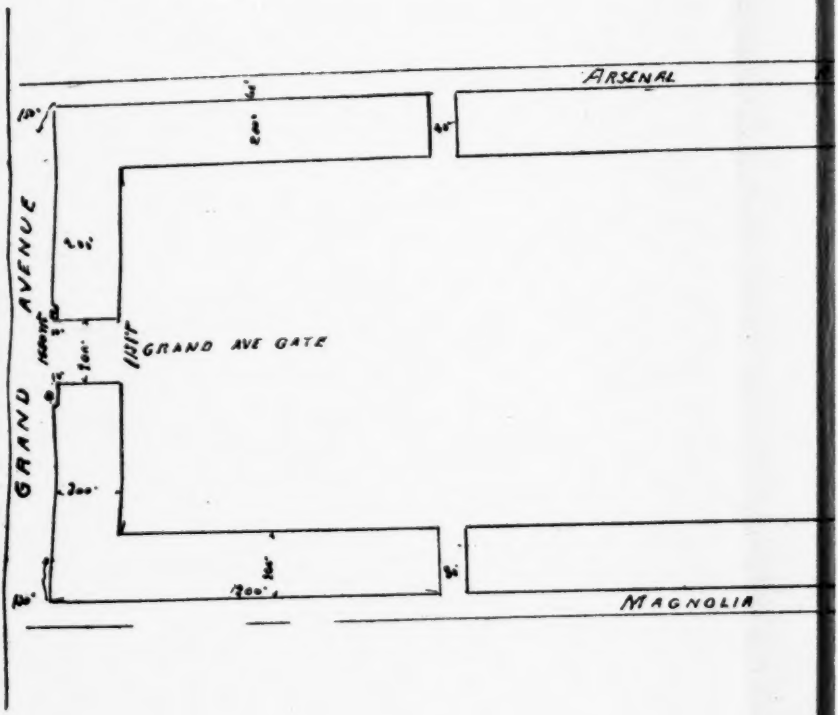
STATE OF MISSOURI,
County of Saint Louis, ss:

Be it remembered, that on this twentieth day of October A. D. eighteen hundred and sixty-eight, before me, Henry J. Siterlin, the undersigned, a Notary Public, within and for the County and State aforesaid, duly commissioned and qualified, came Henry Shaw of the City of St. Louis, party of the first part, and James S. Thomas, Mayor of the City of St. Louis, on behalf of the City of St. Louis, party of the second part, who are personally known to me, to be the same persons, whose names are subscribed to the foregoing instrument of writing as parties thereto, and they acknowledged the same, to be their act and deed for the purposes therein mentioned.

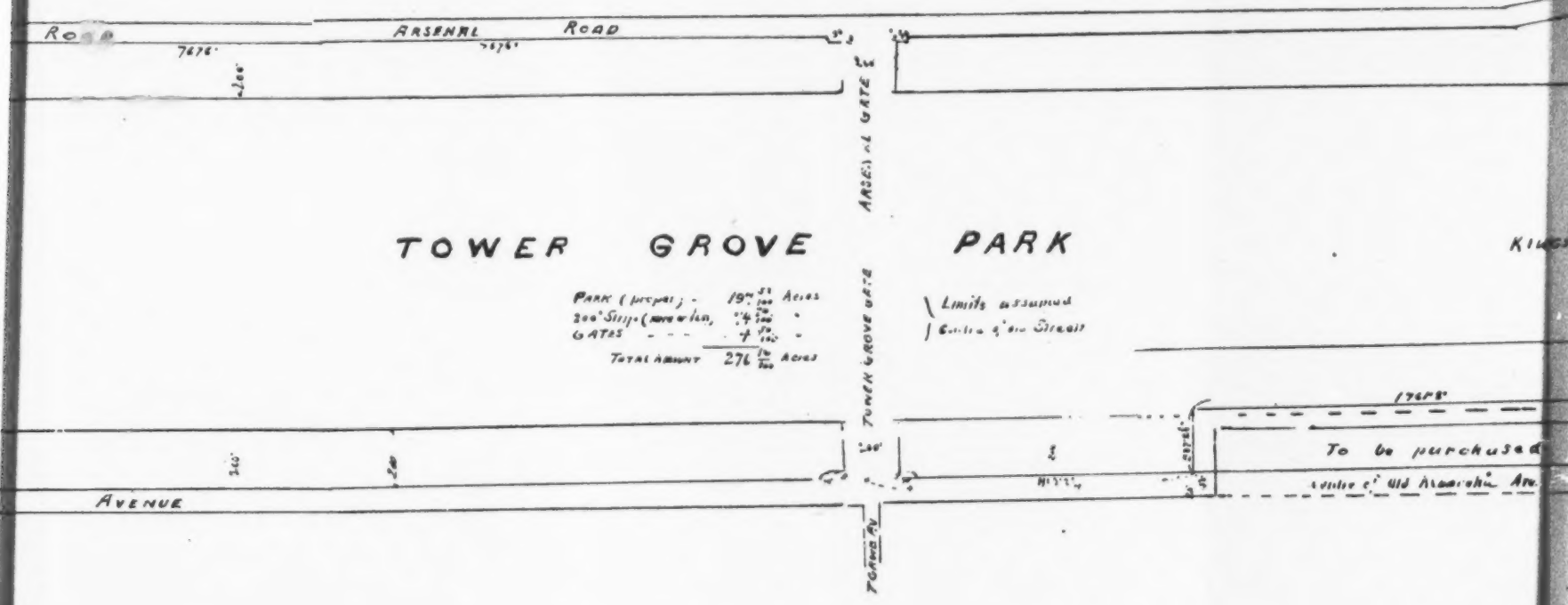
In testimony whereof, I have hereunto set my hand and affixed my notarial seal at office in the City of St. Louis, the day and year last above written.

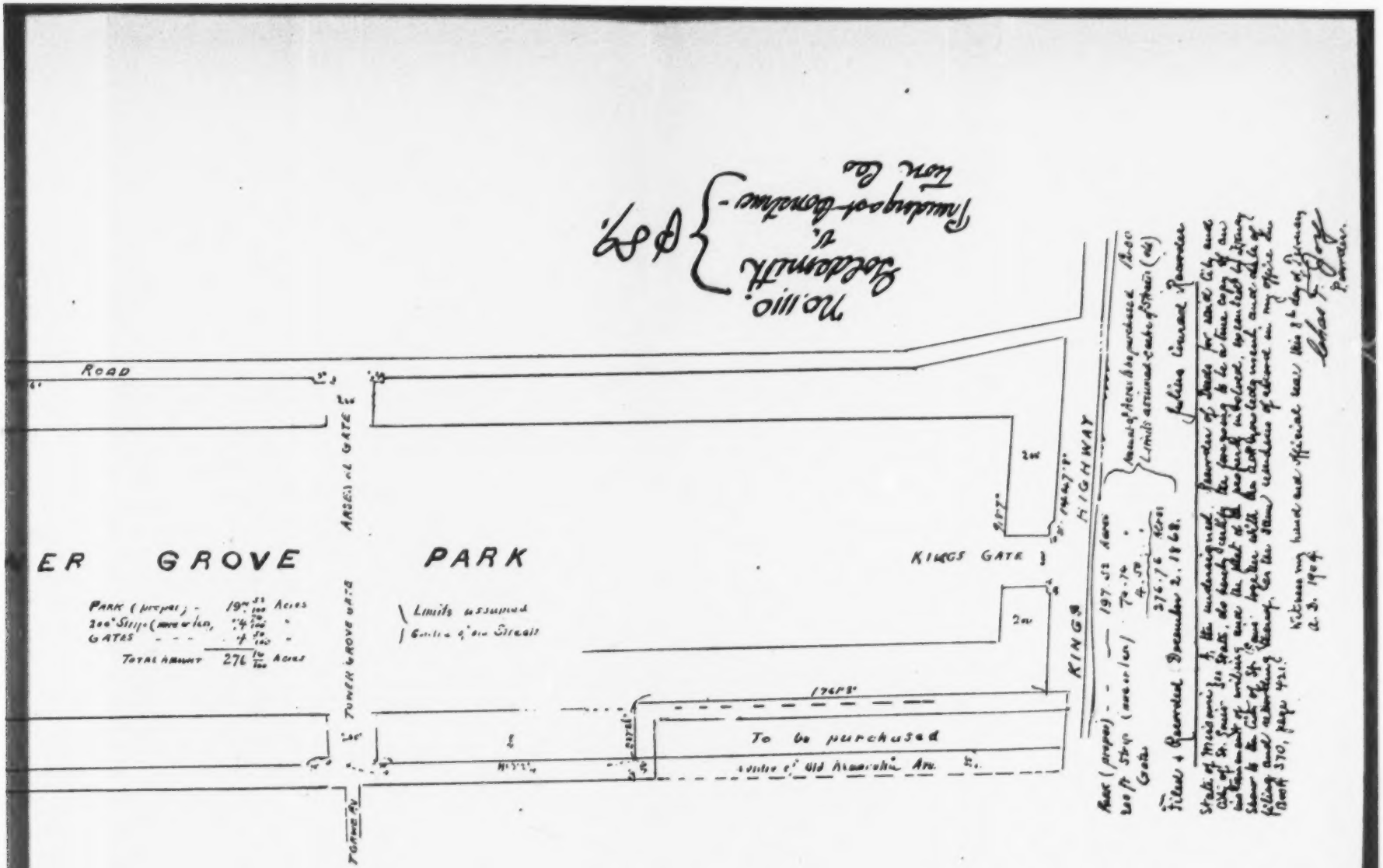
[SEAL.] HENRY J. STIERLIN,
Notary Public, St. Louis County, Missouri.

(Here follows diagram marked page 89.)


ARSENAL
GRAND AVENUE
GRAND AVE GATE
MAGNOLIA

No. 1110. Goldsmith vs. Missouri Construction Co. } 87.




No. 110.
Bellamith
v.
Woodroffe-Gonsalves
Tax Co
879.
ROAD
ARSENAL GATE
TOWER GROVE GATE
ER GROVE PARK
KINGS GATE
KINGS HIGHWAY
PARK (proper) - 197.53 Acres
200' Strip (more or less) 7.47 "
GATES - - - .50 "
TOTAL AMOUNT 276.70 Acres
Limits assumed
Centre of Old Roadway
To be purchased
Centre of Old Kingshighway Ave.
TOWER AV
Area (proper) - - 197.53 Acres
less 200' Strip (more or less) 7.47 "
Gates .50 "
376.76 Acres
Titles & Recorded December 2, 1868.
Julius Conrad Pommer
Kirkwood, Mo. this 2d day of January A. D. 1904
Julius C. Pommer.

90 Also a certified copy of a deed from Henry Shaw to the City of St. Louis, dated July 9, 1872, stating that it is called a deed but seems to be in the nature of a covenant or agreement on the part of Mr. Shaw, recorded in the recorder's office in book 449, page 508, same being in words and figures, as follows to-wit:

U. S. Stamp 50c
H. S. July 9–72

Whereas Henry Shaw of the City of St. Louis did convey by deed dated 20th October, 1868 and recorded in the recorder's office of St. Louis County in Book 370, page 421 to the City of St. Louis a certain tract of land containing two hundred and seventy-six & 76/100 acres of which Tract two hundred & two 02/100 acres were donated for a public park and the Gates and Approaches thereto and seventy-four 74/100 acres were by said City of St. Louis *were* to be leased by said City through the Board of Commissioners of said Tower Grove Park and the revenues derived therefrom to be paid over to said Shaw or assigns as will more fully and at large appear by reference to the provisions of said Deed And Whereas it was provided by the terms of said conveyance that such conveyance was made upon the express condition that the said City of St. Louis should hold said property so long as said City should comply with the conditions annexed to the grant thereby made and then upon the violation of said conditions or any of them the property should at once revert to said Shaw or to whom soever he might appoint And whereas the condition in respect to the leasing of said seventy-four 74/100 acres (being a strip of Two hundred feet in width surrounding the Park) and paying to said Shaw the revenue is liable to different interpretation as to the performance thereof and the dependence of the grant so far as the two hundred and two 02/100 acres granted by said Tower Grove Park and its approaches are concerned is deemed onerous
91 by said City. Now therefore the said Henry Shaw does hereby covenant and agree to and with the City of St. Louis that the non performance by the City of St. Louis of the conditions covenants & agreements on the part of the City in relation to said seventy-four 74/100 acres shall not work any forfeiture of the grant so made to the City of St. Louis of the Two hundred and two 02/100 acres set apart and designated as Tower Grove Park in said Deed and the plat annexed thereto the said Shaw expressly reserving to himself and assigns the full and perfect right at all times upon any willful violation on the part of the City or said Commissioners to lease the said Seventy-four 74/100 acres from time to time as provided in said conveyance and pay the rents to him or to whomsoever he may appoint to enforce the performance of the agreement for and concerning the said leasing or payment of the rents and revenues therefrom unto said Shaw or assigns by writ of Mandamus or other appropriate remedy against the City of St. Louis or said Commissioners the said Shaw in no manner modifying changing or impairing the conditions of said grant in this particular so far as the 74 74/100 acres are concerned. And whereas also it is desired by said City that the condition of said grant that the said City and

County of St. Louis shall each year appropriate the sum of Twenty-five thousand dollars in gold for the keeping up maintaining and improving said park shall be made more definite and specific hereof the third condition specified in said deed Therefore the said Shaw does hereby covenant and agree to and with the said City of St. Louis that no forfeiture of the said Tower Grove Park, and its approaches of Two hundred and two 02/100 acres no right of re-entry upon said park shall accrue to or be enforced by said Shaw his heirs or assigns unless upon the wilful neglect or default of said
City to make such yearly appropriation and not unless the
92 said Shaw his heirs or assigns be due notified in writing said
City that he or they claim said forfeiture and right of re-entry by virtue of such neglect or default on the party of said City and one year after said restrictions shall have expired without any such appropriation having been made. Nothing hereby contained shall be considered in any way as qualifying impairing or controlling the right of said commissioners of Tower Grove Park to demand and have from said City from and after the period stipulated in said deed the yearly sum of twenty-five thousand dollars as provided therein or the right of said Shaw his heirs or assigns or said Commissioners to enforce the payment of the same by appropriate remedies if they select. Said Shaw hereby grants the performance on the part of the said City of St. Louis of the second conditions annexed to said Grant being the payment by the City of St. Louis to said Commissioners of the proceeds of Bonds of the City of St. Louis authorized were issued by law for the laying out constructing and Embellishing said park. This agreement is not to be considered and taken as in anyway modifying controlling or affecting the provisions and conditions in said Deed contained except as to the matters and to the extent and degree herein mentioned but the same remain in full force entirely unaffected by anything herein contained. The said Henry Shaw for and in consideration of one dollar to him paid by the City of St. Louis does hereby remise release quit claim and convey unto the City of St. Louis for the purposes of Tower Grove Park, and as a part thereof a certain lot of ground containing two hundred feet from north to south by one hundred feet from east to west and being the eastern one hundred feet of said strip of Two hundred feet surrounding the Park Commencing at the Tower Grove Gate as represented on the plat annexed to said
deed and running East One hundred feet being the same lot
93 of ground on which the Superintendent's house & offices of
said park are placed To have and to hold the same unto the said City in absolute property in fee upon the same Terms and Conditions as they now hold said Tower Grove Park and so long as the said City shall comply therewith. In Witness Whereof the said Henry Shaw has hereunto set his hand and seal this 9th day of July 1872.

HENRY SHAW. [SEAL.]

STATE OF MISSOURI,
County of St. Louis, ss:

Be it remembered that on this thirteenth day of July A. D. (1872) Eighteen hundred and seventy-two before me the undersigned Recorder of Deeds for said County came Henry Shaw who is personally known to be the same person whose name is subscribed to the foregoing instrument of writing as party thereto and he acknowledged the same to be his act and deed for the purposes therein mentioned. Witness my hand and official seal the day last aforesaid.

[SEAL.] W. C. KENNETT,
Recorder.

Filed and Recorded July 13th, 1872 at 12:20 P. M.
W. C. KENNETT,
Recorder.

STATE OF MISSOURI,
City of St. Louis, ss:

I, the undersigned Recorder of Deeds for said City and State, do hereby certify the foregoing to be a true copy of an instrument of writing executed by Henry Shaw to City of St. Louis, together with acknowledgment and date of filing and recording thereof, as the same remains of record in my office in Book 449, Page 508.

94 Witness my hand and official seal this 8th day of February, A. D. 1909.

[SEAL.] CHAS. F. JOY,
Recorder.

Mr. JAMES GURNEY, SR., sworn for defendants, testifies, as follows:

Direct examination.

By Mr. Goldsmith:

Q. State your name and age please?
A. James Gurney, I am between 77 and 78.
Q. What is your occupation at the present time?
A. At the present time I am superintendent of Tower Grove Park.
Q. How long have you been superintendent of that park?
A. From the day it was given to the city to be made a park of.
Q. That was in October, 1868, was it not, about?
A. I think so.
Q. Consequently you know the location of the various parts of the park and the condition of the park while you have been superintendent, that is correct, is it not?
A. Yes, sir.

Q. Do you know of the drains leading from the park westwardly into or towards Kingshighway?

A. Yes, sir.

Q. I will show you this plat or sketch prepared by Mr. Vetsburg, and unless there is objection, in order to save time, I will just ask some leading questions—when there is objection let me know, Mr. Taylor. You know of the sewer inlets that are on the east side of Kingshighway and adjacent to the park, do you not?

A. Yes, sir.

Q. Now, look at this plat and see whether these places marked A B C D and E represent the location of those inlets approximately?

A. Yes, sir; they do.

Q. Are there any pipes for drainage in the western part of the park near Kingshighway?

95 Mr. Taylor: That comes under our objection.

The Witness: No, sir.

By Mr. Goldsmith: What are there?

A. Drains or gutters on the side.

Q. Are there not some pipes leading into the gutters too?

A. There are no pipes, there is just one when you are about two-thirds of the way across the park going from west to east, as you come near to the east there is a culvert made which goes across Arsenal.

Q. That is more than one thousand feet east of Kingshighway?

A. Yes, sir; it is a long way.

Q. It is about the center of the park?

A. A little over the center of the park.

Q. We are not concerned with that, we are merely concerned with the western front?

A. You asked me the question if there were drains and that is on the west side.

Q. I didn't mean to say that, I merely want to save you the trouble of an explanation, Mr. Gurney; there is a hydrant there in the western part of the park, is there not?

A. Yes, sir; back of the house.

Q. Where is the house?

A. Near the west gate.

Q. That is on park property?

A. Yes, sir.

Q. About how far from Kingshighwawy, the line of Kingshighway?

A. I never measured.

Q. Do you know, about?

A. I don't know.

Q. Is it about 100 or 200 feet?

A. Yes, probably.

Q. Between 100 and 200 feet?

A. I suppose so.

Q. Where is the hydrant?

A. It is just east of the house.

Q. The house is near the entrance, the western entrance to the park?

A. Yes, sir.

Q. It is on the——

A. It is north of the driveway.

Q. That is of the central entrance?

A. Yes, sir.

Q. How long have these drains, these gutters that you call them, drained into the inlets?

A. From the first laying out of the drives.

96 Q. You mean they have been drained ever since the drives have been laid out?

A. Yes, sir.

Q. And that is more than 10 or 15 years, is it not?

A. I think so, there has been no alteration to the guttering on each side of those drives.

Q. And when were those gutters laid?

A. Well, on the west part about a year and a half, we worked on the east part of the work first and then on the west part, and then, of course, when we had all our stakes for the drives we put the gutters in, and they are the gutters that remain there today.

Q. Then they are more than 20 years old?

A. I think so, as you told me, 1868, a little while ago, it was about a year and a half after that, you can figure it out.

Mr. Taylor: 40 years.

By Mr. Goldsmith: How far east from Kingshighway do the gutters which drain into Kingshighway extend in the park, about how far?

A. Oh, about 200 to 300 feet, it is where there is a little cross drive at the west end and then the ground slopes towards Kingshighway only a short distance.

Q. Do you know where the top of the hill is?

A. That is the place.

Q. If the top of the hill is about 600 feet, then these gutters would extend farther, would they not—do they extend to the top of the hill?

A. Yes, but I did not measure it, I don't think it is 600 feet.

Q. Then the water that came down these gutters flowed into these inlets which are on the sketch I have shown you?

A. Yes, sir.

Q. Where did the water go, how was it drained from these inlets when the inlets were thus constructed?

A. It was taken to the west line of the park on the east side of the little drive outside the park, and then from there we took it in a diagonal shape across what is now Kingshighway, it was hardly navigable then up across there, a little diagonally across to

97 what is now the west side of Kingshighway and it was near to a deep ravine, washout, that was all we did.

Q. How did you lead it across Kingshighway, I mean did you lead it in pipes?

A. Yes, sir.

Q. You lead it in pipes across Kingshighway to this ravine?
A. To a silt pit, of course there was a grading over the silt pit.
Q. There was an inlet to the sewer or drain?
A. Yes, sir; the water ran into those silt pits.
Q. Is this inlet C the place of the silt pit?
A. No, D is the silt pit, it comes to there and goes across.
Q. The silt pits are marked D and D on this plat?
—. Yes, sir.
Q. Then it ran from E across Kingshighway?
A. Yes, sir.
Q. There is an inlet at C here?
A. Yes, sir; because this one came to here and that goes across, that triangle which is here goes across to there (indicating).
Q. First we will take C, C is on the northern line of the driveway?
A. Yes, sir.
Q. Near where the driveway turns into Kingshighway?
A. Yes, sir.
Q. Now, then, there is a silt pit there, is there not?
A. Yes, sir.
Q. Now, where did that silt pit drain into?
A. In here and then it comes here (indicating).
Q. You mean it drained into the road and then down to E?
A. Yes, sir; then it goes across to Kingshighway.
Q. Now, where was the ravine with relation to the present streets, you know where Magnolia Avenue is?
A. Yes, sir.
Q. Where was that ravine with regard to the present Magnolia Avenue?
98 A. It was a little way, I believe, on this side of the south line of Magnolia Avenue, a little on the south of the south line, I believe it was, but really I couldn't tell you for sure, just about there.
Q. Just about Magnolia Avenue?
A. It was just a little beyond the limits of the park itself, I feel almost sure of that, I am not quite sure.
Q. At all events it was at Magnolia Avenue or a little south of it?
A. Yes, sir; that is it.
Q. What sort of ravine was this, an open ravine?
A. Yes, sir; it was.
Q. And then the water flowed in this ravine and flowed away?
A. Yes, sir.
Q. How did it flow, eastward or westward, do you remember?
A. It went a little way north.
Q. And then how did it go?
A. And then it went east.
Q. Now, take the inlet A which is the inlet on the east line of Kingshighway near the southern line of the driveway, and then there is one opposite that marked B?
A. Well, I have told you that that comes into there (indicating).
Q. That is A empties into B?

A. Yes, sir.
Q. Where did the water come from B?
A. As I have told you, right here (indicating).
Q. Into the ravine, how was it led there?
A. A straight line from here to there (indicating).
Q. You mean there was a drain from——
A. Under this center part, it goes through.
Q. Then there was a drain underneath the street from B until it connected with a drain leading from D and E?
A. What do you mean by street, do you mean Kingshighway?
Q. Yes?
A. No, I think not, it is just about the line of streets that would be on the east side of Kingshighway, it is not in Kingshighway, I don't think.
Q. You think it is on park property?
A. Yes, sir.
99 Q. At all events it was led under the surface?
A. Yes, sir.
Q. By a pipe I suppose?
A. Certainly.
Q. Did it connect with the other pipe?
A. Yes.
Q. Then was it led straight, that is parallel, following the line, about?
A. Well, I can't tell you that.
Q. But at all events it connected with this pipe leading across Kingshighway and then into the ravine?
A. Yes, sir.

Mr. Taylor: Leading across Kingshighway, where is there any pipe leading across?
Mr. Goldsmith: He has spoken of a pipe leading across Kingshighway, from the northernmost limits he said there was a pipe.
The Witness: Diagonally across Kingshighway and from there it emptied into a silt pit and from that silt pit it went into this ravine, went north.

Q. Then the pipes crossed Kingshighway there at the northernmost silt pit?
A. Yes, sir; I said that.
Q. About how far below the present grade of Kingshighway are these drains that led into and across Kingshighway?
A. A couple or three feet.
Q. Now, how long was the drainage continued in that way into this ravine?
A. Well, I can't tell you that.
Q. That ravine is not there now, is it?
A. I have not been to look to tell you the truth, if you ask me inside the park I could tell you, but that I really do not know; I suppose it is, of course, having been made up, Kingshighway graded and made into a street, I suppose that was filled up.

Q. But you have no personal knowledge of that?
A. No, I have not.

Cross-examination.

By Mr. Taylor:

Q. That drain was disposed of when Kingshighway was made a street?

Mr. Goldsmith: He says he don't know.

100 The Witness: I don't know.

By Mr. Taylor: You have not seen or heard of it since?

A. No, sir.
Q. About what year of our Lord was that done?
A. Kingshighway?
Q. Yes.
A. The last two or three years.
Q. Three or four years?
A. Yes, that is, making it a street.
Q. You don't know when that drain was disposed of?
A. No, I do not.
Q. You don't know how long it existed there?
A. A good many years.
Q. Now, I understood you to say something about a drain going to Arsenal Street?
A. Yes, that has nothing to do with this, nothing at all, no connection with it; when you pass by the gate on the drive in the park, the west gate, then the ground inclines towards the south, the grade, and there on the east side of the drive, of the park drive, is that silt pit which catches the water that comes in from the gutters and crosses the drive and then goes to Arsenal Street and goes under Arsenal Street, it is there now.

By Mr. Goldsmith: You say south, you are speaking of what is south of the driveway?

A. Yes, sir.
Q. This drainage you have spoken of in answer to my question is the drainage that is north of the driveway?
A. Why, certainly.
Q. Now, this inlet A which is on the south line of the driveway, that you have said also was the one which went into B, and then flowed north into this other drain?
A. Straight along until you get to the north corner and then diagonally across Kingshighway.

By the Court: Do you know, as a matter of fact, Mr. Gurney, whether the drainage that you have described at present is led into the public sewer on Kingshighway?

A. I have no knowledge of that, your Honor.

101 Q. You were not present when any connection was made between the two, were you?

A. I don't know of any connection, I never went down to see them. As I drove by of course, I looked around the park, I saw that

they were putting a big sewer in but they never came to me and I never went to them so that I couldn't tell you if there was any connection at all with that sewer.

JAMES GURNEY, Jr. sworn for defendants, testifies as follows:

Direct examination.

By Mr. Goldsmith:

Q. State your name please?
A. James Gurney, Jr.
Q. You are a son of the previous witness?
A. Yes, sir.
Q. What is your occupation?
A. Assistant to him.
Q. How long has that been your occupation?
A. 6 years, that is approximately, maybe a few months either way but it is approximately 6 years.
Q. Since what time?
A. 6 years ago.
Q. That would be since 1904?
A. Yes.
Q. And were you assistant at all times during those 6 years?
A. Yes, sir.
Q. I mean continuously without any break?
A. Yes, sir.
Q. You have heard the testimony about these inlets?
A. Yes, sir.
Q. And you have seen this plat?
A. Yes, sir.
Q. That sketch shows the location of the inlets, does it not?
A. Yes, sir.
Q. You have heard your father's testimony with regard to the drainage?
A. Yes, sir.
Q. Now, do you recollect seeing the water drain in the way he has mentioned, did that occur during the 6 years you have been there?
A. What did he say about the water draining?
102 Q. Then I will ask you to state what was the drainage from the west part of the park into Kingshighway when you first came to the park in 1904?
A. The surface water ran along gutters on the north side of the park, on this plat from there down to that culvert (indicating).
Q. Give how the culvert is marked?
A. C.
Q. Then how did it drain?
A. I don't know what became of the water when it left that culvert.
Q. Now, is there any ravine on the west side of Kingshighway at present near Magnolia?
A. Parallel with Kingshighway.

Q. Near Kingshighway and Magnolia Avenue?
A. There is no ravine south of Magnolia Avenue west of Kingshighway that I found.
Q. Is there any between Magnolia Avenue and Reber Place?
A. No, sir.
Q. What is there there on the west side of Kingshighway?
A. Residence property.
Q. And there are houses built up along there?
A. Yes, sir.
Q. Quite a number.
A. Yes, sir.
Q. And have those houses been there ever since you have been connected with the park?
A. Some of them.
Q. You know of this hydrant that is in the park?
A. Yes, sir.
Q. You know of the house that is in the park?
A. The one at Kingshighway, I presume you mean?
Q. Yes.
A. Yes, sir.
Q. How long has that house been there?
A. I couldn't tell you.
Q. Has it been there during the whole of the 6 years mentioned by you?
A. Yes.
Q. Do you know whether the water from the hydrant drains into any of these inlets?
A. The water from that hydrant that is close to the house drains into inlet C as you have it marked.
103 Q. But you don't know what becomes of it after it leaves C?
A. No.
By the Court: Were you there when the sewer was laid in Kingshighway?
A. Yes, sir.
Q. What became of these drains across Kingshighway, if any, in the laying of that sewer?
A. I don't know, your Honor.
Q. You didn't see whether they were disturbed or cut by it or not?
A. No, sir.
By Mr. Goldsmith: Let me ask you one thing, these drains were how far below the surface of the street?
A. I don't know.
Q. Can't you tell now the height of the water——
A. The culvert I judge is three or four feet, the drains I should judge were three feet below the surface running into the sewer, but of course, I can't say how deep they are running at the gutters.
Q. That is not exposed to view, of course?
A. No, sir.
Q. Do you know how deep the sewers are that are laid in Kingshighway, I mean the district sewer?
A. No, sir.

Q. Do you know whether it is considerable deeper than three or four feet?
A. Yes, it is.
Q. In other words the district sewer in Kingshighway is considerably deeper than this drain?
A. Oh, yes; it is deeper than the drain that runs from the hydrant to the silt pit.
Q. And from the top of the silt pit as it flows out wherever it goes?
A. I cannot say that because I don't know where it flows to.
Q. But you know the height of it below the surface, you said that was three or four feet?
A. Yes, sir.

104 JAMES GURNEY, Sr., recalled, further testifies, as follows:

Direct examination.

By Mr. Goldsmith:

Q. How long has that house been there at the entrance?
A. About three years after we started the park.
By Mr. Taylor: Three years after 1868?
A. Yes, sir.

Defendants' counsel offered and read in evidence sections 178 and 2187 of McQuillin's Municipal Code of the Ordinances of the City of St. Louis.

The Court: You have no reference to the Woerner Code?
Mr. Goldsmith: In Woerner's Code they are section 116 page 578 and section 2314 on page 1063. I have taken McQuillin's Code because that antedates the date of the sewer.

This is all the evidence introduced by defendants.

Plaintiff's Further Evidence.

The plaintiff, to further sustain the issues on his part, offers and introduces evidence as follows:

GEORGE G. PRENDERGAST, the plaintiff, being duly sworn, testifies as follows:

Direct examination.

By Mr. Taylor:

Q. You are the president of the George G. Prendergast Construction Co., the plaintiff in this case?
A. Yes, sir.
Q. You constructed this sewer along King's Highway from May, 1905 to May, 1906?
A. Yes, sir.

Q. Did you make any connections between your sewer and any inlets, pipes or drains across King's Highway?

A. No, sir; none.

Q. You surrendered the original bill in this case to the
105 City authorities and got the bill that is sued on here in this case, did you not?

A. Yes, sir.

Q. The defect in the original bill was——

Defendant's counsel objects to the question as it will appear from the bill itself if there is any defect.

Q. On account of the description in the original bill——

Defendant's counsel objects as immaterial.

Mr. Taylor: The bill is in evidence.

Mr. Goldsmith: It has not been offered.

Mr. Taylor: But it was shown to the witness.

The Court: Of course the criticism is that that discrepancy should be shown by the bill.

Mr. Goldsmith: Is it considered in evidence?

Mr. Taylor: Yes, sir.

The Court: Do you mean the old bill?

Mr. Taylor: The old bill was the one that was shown to the Court, it was surrendered and this bill——

The Court: It is marked cancelled on the bill itself.

Cross-examination.

By Mr. Goldsmith:

Q. Did you personally superintend the Construction of these sewers?

A. Yes, sir.

Q. Have you been in Court before this morning?

A. Yes, sir.

Q. Have you heard the testimony of the two Messrs. Gurney?

A. Yes, sir.

Q. You have heard the reference of young Mr. Gurney to drains leading along or across King's Highway?

A. Yes, sir.

Q. Do you know what was done with regard to those drains as you dug the district sewer?

A. I don't think we ever encountered them.

Q. You don't think you ever encountered them?

A. No, sir.

Q. Would you be positive as to that?

A. Well, if we did they were dry, they didn't cause any
106 trouble; if they had I would have remembered them.

Q. How deep was this sewer that you constructed along King's Highway between Arsenal and Magnolia Avenue?

A. I couldn't say positively, but about, I think, about 11 or 12

feet, possibly a little less, it got shallower as we came to Arsenal Street.

Q. Near Magnolia it was 11 or 12 feet?

A. Possibly that deep, I couldn't say.

And this was all the evidence in this cause.

Thereupon, on the ninth day of January, 1911, and prior to the submission of this cause to the Court, this cause was, by and with the consent of all the parties hereto, transferred by the Court from Division Number one of said Circuit Court of the City of St. Louis to Division Number Three of said Circuit Court, the Honorable Hugo Muench, Judge of said court, having at the time been transferred from said Division Number One to said Division Number Three.

Thereupon the defendants requested the court to give, but the Court refused to give, the following instructions:

"The court declares the law to be that the special tax bill sued upon herein is invalid as a matter of law."

"The Court declares the law to be that, under the pleadings and the evidence, the plaintiff is not entitled to recover."

"The Court declares the law to be that the ordinance for the establishment of the Manchester Road Sewer District Number Three, which was read in evidence, is invalid as a matter of law."

And the defendants then and there at the time duly excepted to the action of the court in refusing to give said instructions and to its action in refusing to give each of said instructions.

107 And thereupon the Court at the request of the defendants gave the following instructions:

"The Court declares the law to be that it is not essential for the defendants to establish that the plaintiff in this cause connected, or did anything towards connecting, any drain draining water from Tower Grove Park with the sewers mentioned in the petition, being the district sewers constructed by the plaintiff in Manchester Road Sewer District Number Three."

"The Court declares the law to be that it is not essential for the defendants to establish that the plaintiff in this cause connected, or did anything towards connecting any drain leading from Tower Grove Park with the sewers mentioned in the petition, being the district sewers constructed by the plaintiff in Manchester Road Sewer District Number Three."

And these were all the instructions given by the Court.

And thereupon, to-wit, on the sixteenth day of January, 1911, and before the submission of said cause to the Court, defendants made and filed in this cause a request in writing for a statement by the Court in writing of the conclusions of facts found by it separately from

the conclusions of law which said request so made and filed was in words and figures as follows:

"In the Circuit Court of the City of St. Louis.

Room No. 1. Cause No. —.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, Plaintiff,

vs.

DAVID GOLDSMITH et al., Defendants.

The defendants in the above entitled cause, pursuant to the statute in that behalf made and provided, to-wit, pursuant to Section
108 1972 of the Revised Statutes of the State of Missouri, 1909, hereby, with the view of excepting to the decision of the Court upon the questions of law or equity arising in the above entitled cause, request the Court to state in writing the conclusions of facts found by it separately from the conclusions of law.

DAVID GOLDSMITH,
Attorney for Defendants."

And thereupon this cause was submitted to the Court.

And thereafter, on the third day of April, 1911, the Court, on submission, made and filed herein its statement in writing of its conclusions of facts found by it separately from its conclusions of law, which said statement in writing was in words and figures, as follows:

Division No. 3.

No. 66633.

On Trial and Submission.

"THE GEORGE G. PRENDERGAST CONSTRUCTION CO.

vs.

DAVID GOLDSMITH et al.

Finding of Facts and Conclusions of Law.

From the evidence adduced at the hearing of this cause the Court doth find the following facts, and conclusions of law therefrom, to-wit:

The Court finds that pursuant to ordinances of the City of St. Louis, numbered 21,974 and 21,975, duly enacted as provided by law, plaintiff entered into written contract with said City, numbered 7,189, for the construction of sewers in Manchester Road Sewer District No. 3 as by said ordinance prescribed and defined, and that the assessment district, to pay for the construction of said sewer, embraced the land

described in the petition which was then owned by defendants, and other lands.

That plaintiff completed the work called for by said contract, and that thereupon the proper officers of the City of St. Louis
109 made assessment of such land of defendant for its proportionate part of the cost of said sewer in accordance with the terms of said Ordinance, and pursuant to Sec. 21 Art. VI of the Charter of St. Louis City, and did, on June 18, 1906, issue a special tax bill, with 5 coupons for instalments thereto attached, in a total sum of $1,297.60, payable to plaintiff, in conformity with such assessment; that thereafter, on the 23rd day of February, 1910, the same officers of the City of St. Louis (being joined therein by their successors in office) did cancel said first named special tax bill, by reason of an error in the description of the property to be affected thereby, and did, in lieu thereof, issue another special tax bill in the same amount, with like coupons attached, payable to plaintiff, and with the description of land to be affected thereby truly and specifically set forth therein. And that said renewed tax bill is signed respectively, by the persons who held the offices of President of the Board of Public Improvements, and Comptroller of the City of St. Louis, Missouri, at the time when said work of sewer construction was completed, as well as by the persons who respectively held said offices at the time when said renewed special tax bill was issued, in whose name, also, the 5 coupons attached to said tax bill are signed by means of lithographic print.

And the Court further finds that due notice of the issuance of said tax bill now sued on was served on all surviving defendants on April 9th, 10th and 11th, 1910.

And the Court further finds that there is no evidence before it to justify the inference that the Municipal Assembly of the City of St. Louis, in passing the ordinances establishing the limits of said "Manchester Road Sewer District No. 3" was actuated by motives of fraud or oppression, and that such improper motives, if any, can and must be inferred solely from the failure of said Assembly to incorporate in such district any tracts or parcels of land the topog-
110 raphy of which might render it necessary or expedient to then, or thereafter, drain the water or sewage therefrom into the particular sewer in question.

And the Court further finds from the evidence, that under a deed of conveyance, dated and acknowledged October 20th, 1868 and recorded in Book 370, page 421 Henry Shaw conveyed to the City of St. Louis the entire tract now known as Tower Grove Park, located between Grand Avenue on the East, Kingshighway on the West, Arsenal Street on the South and Magnolia Avenue on the North, but reserved therefrom, for his own use, a strip 200 feet wide, completely surrounding the tract to be used as a park (barring necessary openings or passageways through the same); said surrounding strip of 200 feet to be leased through the Commissioners of the park, in lots of not over 200, nor under 100 feet in width, for periods of 30 years, respectively and the net income to be derived from such leases to be turned over to said Shaw, or his assigns: Said deed further providing that for any violation of or failure to perform the covenants and conditions thereby imposed upon the City of St. Louis, said

Shaw, his heirs or assigns, might cause a forfeiture of the title so granted, and a reversion of the land conveyed to said Shaw or his appointee.

And by a supplemental and corrective conveyance dated the 9th day of July, 1872, recorded in Book 449, page 508, Recorder's office of the City of St. Louis, said Shaw did modify the conditions in said former deed contained as to forfeiture or reverter of title, but did not affect the rights to the said tract of land to be used as Tower Grove Park, nor of the strip, 200 feet in width, surrounding the same.

And the Court further finds that the entire Western front of the tract so conveyed by Shaw to the City of St. Louis by deed of October
20, 1868, including in such front both the Western gate or en-
111 trance of Tower Grove Park and the strip 200 feet in width, surrounding the Park proper and embracing a total frontage along Kingshighway, from the North line of Arsenal Street to the South line of Tower Grove addition of about 1470 feet abuts the East line of Kingshighway, in which street one of the lines of sewer constructed under the contract and ordinance in question is located; and that none of the property so included within Tower Grove Park, or the strip of 200 feet in depth, reserved by said Shaw for residence property, is included within the taxing district for such sewer construction, nor is any property so included which abuts Arsenal Street, and the sewer therein, for a distance of 1000 feet, more or less, from the West line of Kingshighway, Westwardly along said Arsenal Street.

That with the exception of an area composing some 300 feet, each way, and located at the Southwestern corner of Tower Grove Park, the Western part of said Park for a distance of some 600 feet East of Kingshighway is of an elevation higher than said Kingshighway between Arsenal Street and Magnolia Avenue, and the natural drainage thereof is in the main Westwardly towards said Kingshighway, and the Court does further find that before the building of the sewer in question, surface water and hydrants drained from said part of the Park, through drains and gutters, under said street and sidewalk, to a point West of Kingshighway; that whatever drains for surface and hydrant water now exist in said Western and Northwestern portion of said Park lead into that section of the sewer in question, situated in Kingshighway adjoining said Park, but the Court is unable to determine from the evidence as to when such connection with said sewer was accomplished, or by whom.

I do also find that at the time the work in question was per-
112 formed it was provided by the Revised Ordinances of the City of St. Louis that water draining from roofs of houses should not flow over sidewalks, but should be conducted through pipes to a sewer, if available, and if not, then such water should be conducted through pipes below the sidewalk, and into the open gutter of the street.

And the Court does not find from the evidence that it is not possible or feasible to drain the surface water now falling upon or collected from that portion of Tower Grove Park, and the reserved strip of 200 feet, which is higher than and inclined towards Kingshighway, from the surface of said land in any other manner than

through or by the District Sewer constructed in Kingshighway, or that sewage from houses upon said reserved strip, if any there ever be, cannot be disposed of by means other than said sewer.

Conclusions of Law.

Finding the facts as aforesaid, the Court concludes as a matter of law, that it was within the powers of the Municipal Assembly, in the passage of Ordinances establishing the Sewer District wherein the work sued for was performed, to embrace and designate therein only such real estate as, in its judgment, would be benefited thereby, and that the discretion vested in said Municipal Legislature is not subject to review by this Court, unless the powers of said legislature were affirmatively shown to have been exercised fraudulently, oppressively or arbitrarily. (Prior v. Construction Co. 170 Mo. 440; Herman v. Schulte, 166 Mo., l. c. 416; Herman v. Allen, 156 Mo., l. c. 550.) And it is further concluded, as a matter of law, from the precedent facts, that the mere omission of lands from said district, which might, at one time, be reasonably included in the sewer district in question, or as to which it is reasonable to assume that the same would more conveniently be served by the sewer 113 in question than any other, does not justify the Court in concluding that the Municipal Assembly, in omitting said lands from the sewer district in question, was actuated by motives of fraud or oppression; or that the prima facie liability of defendants (Sec. 25, Art. VI. Charter of City) established by the certified special tax bill is thereby rebutted and overturned. Nor does the Court find that, as a matter of law, it was necessary that the several coupons for annual instalments of said tax bill (should the owners of the land have chosen so to pay it) should have been signed by the officials by whom the original tax bill was issued. Such coupons are rather in the nature of receipts for instalments than of certificates of indebtedness.

Therefore, under all the evidence, there must be judgment in favor of plaintiff in the amount of the special tax bill sued upon (viz: $1,297.60) with interest upon the amount of the first instalment ($259.52) from April 11th, 1910, until May 11th, 1910, at 6% per annum, viz: $1.29; and interest on such $259.52 from May 11th, 1910, to this date (10 months and 23 days) at 8%, viz: $18.62, and interest on the remaining instalments ($1,038.08) at the rate of 6% from said 11th day of April, until the filing of this petition (June 22nd, 1910) at the rate of 6% per annum, viz: $13.28, and at the rate of 8% per annum from that to this date, viz: $65.04, to-wit; a total of $1,394.83, and costs accrued in this cause, such judgment to be a special lien upon the real estate described in the petition, with usual conditions as to sale thereof, unless the judgment be paid.

(Signed) HUGO MUENCH,
Judge.

April 3, 1911."

And the defendants then and there at the time duly ex-
114 cepted to the conclusions of facts so found by the Court and also separately then and there at the time duly excepted to the conclusions of law so stated in writing by the Court, and also then and there at the time separately and duly excepted to each and every of said conclusions of facts found by the Court, and also then and there at the time separately and duly excepted to each and every of said conclusions of law found by the Court.

And on said third day of April, 1911, and simultaneously with the making and filing herein of said conclusions of facts and said conclusions of law, the Court found and rendered judgment for the plaintiff in and for the sum of thirteen hundred and ninety-four dollars and eighty-three cents, ($1,394.83) with a lien on the property described in the petition of the plaintiff herein.

And thereupon and in due time, to-wit, on the sixth day of April, 1911, and within four days after the making and filing of said conclusions of facts and said conclusions of law, and also within four days of said finding and judgment by the Court, and also during the same term, the defendants filed their motion for a new trial, which said motion is in words and figures, as follows:

"In the Circuit Court of the City of St. Louis.

Division No. 3.

Cause No. 66633.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY

vs.

DAVID GOLDSMITH et al.

Now come the defendants in the above entitled cause and move the court to set aside its finding and judgment herein and to grant them a new trial, and as grounds for this motion allege and say:

1. That the finding and judgment of the court herein is against the evidence.

2. That said finding and judgment is against the weight of the evidence.

115 3. That said finding and judgment is against the law.

4. That said finding and judgment is against the law and the evidence.

5. That under the pleadings and the evidence the Court should have found and rendered judgment in favor of the defendants.

6. That the Court erred in admitting in evidence against the objections of the defendants improper evidence offered by the plaintiff.

7. That the Court erred in refusing to admit in evidence proper evidence offered by the defendants.

8. That the Court erred in refusing to give proper instructions asked by the defendants.

9. That the finding of facts and conclusions of law stated in writing by the Court herein are not in accordance with the statute in that behalf made and provided.

10. That said finding of facts stated in writing by the Court herein is erroneous.

11. That said conclusions of law stated in writing by the Court herein are erroneous.

12. That under said finding of facts stated in writing by the Court herein the Court should have rendered judgment for the defendants.

13. That said finding of facts is not responsive to the issues herein.

14. That said conclusions of law stated in writing by the Court herein are not responsive to the issues herein.

15. That in making said finding of facts the Court omitted to determine material issues of fact herein.

16. That in making said finding of facts the Court failed to consider material evidence as to which there was no conflict.

17. That in making said finding of facts the Court failed to state conclusions of fact which were conclusively established by evidence.

116 18. That the Court erred in including in said finding of facts the following paragraph:

"And the Court further finds that there is no evidence before it to justify the inference that the Municipal Assembly of the City of St. Louis, in passing the ordinances establishing the limits of said 'Manchester Road Sewer District No. 3' was actuated by motives of fraud or oppression, and that such improper motives, if any, can and must be inferred solely from the failure of said assembly to incorporate in such district any tracts or parcels of land the topography of which might render it necessary or expedient to then, or thereafter, drain the water or sewage therefrom into the particular sewer in question."

19. That the Court erred in including in said finding of facts the finding that there is not included in the taxing district mentioned in said finding of facts any property "which abuts Arsenal Street, and the sewer therein for a distance of 1000 feet, more or less, from the West line of Kingshighway, Westwardly along said Arsenal Street."

20. That the Court erred in stating in said finding of facts that it was unable to determine from the evidence as to when the connection was made between the drains for surface and hydrant water mentioned in said finding of facts and the section of the sewer mentioned in said finding of facts, or by whom such connection was made.

21. That the Court erred in including in said finding of facts the following paragraph:

"And the Court does not find from the evidence that it is not possible or feasible to drain the surface water now falling upon or collected from that portion of Tower Grove Park, and the reserved strip of 200 feet, which is higher than and inclined towards Kingshighway, from the surface of said land in any other manner than through or by the District Sewer constructed in Kingshigh-
117 way, or that sewage from houses upon said reserved strip, if any there ever be, cannot be disposed of by means other than said sewer."

22. That the Court erred in holding in its said conclusions of law that the discretion vested in the Municipal Legislature is not subject to review by this court unless the power of such legislature were affirmatively shown to have been exercised fraudulently, oppressively or arbitrarily.

23. That the Court erred in including in its said conclusions of law the following:

"And it is further concluded, as a matter of law, from the precedent facts, that the mere omission of lands from said district, which might, at one time be reasonably included in the sewer district in question, or as to which it is reasonable to assume that the same would more conveniently be served by the sewer in question than any other, does not justify the Court in concluding that the Municipal Assembly, in omitting said lands from the sewer district in question, was actuated by motives of fraud or oppression; or that the prima facie liability of defendants (Sec. 25 Art. VI. Charter of City) established by the certified special tax-bill is thereby rebutted and overturned."

24. That the Court erred in including in its said conclusions of law the following:

"Nor does the Court find that as a matter of law, it was necessary that the several coupons for annual instalments of said tax bill (should the owners of the land have chosen so to pay it) should have been signed by the officials by whom the original tax-bill was issued. Such coupons are rather in the nature of receipts for instalments than of certificates of indebtedness."

25. And the Court erred in holding in its said finding of facts and conclusions of law that under all the evidence there must be judgment in favor of plaintiff.

118 26. That the Court erred in failing to state in its said finding of facts and conclusions of law that the ordinance of the City of St. Louis establishing the Manchester Road Sewer District No. 3, mentioned in the pleadings, was arbitrary and illegal.

27. That the Court erred in failing to state in its said finding of facts and conclusions of law that the ordinance of the City of St. Louis establishing the Manchester Road Sewer District No. 3, mentioned in the pleadings, was unreasonable and illegal.

28. That said finding of facts does not warrant the judgment rendered by the Court herein.

29. That said finding of facts and conclusions of law do not warrant the judgment rendered by the Court herein.

30. That in stating its said conclusions of law the Court omitted to include material matters of law.

(Signed) DAVID GOLDSMITH,
Attorney for Defendants."

And thereafter, on the 8th day of May, 1911, the Court made and entered in this cause an order by which the Court modified its aforesaid conclusions of facts and conclusions of law by striking therefrom lines 7, 8, 9 and 10, on page 4 thereof, beginning with the words "Nor is any property so included", and ending with the words "westwardly along said Arsenal Street", and by which the Court in all other respects confirmed its aforesaid conclusions of facts and conclusions of law, and by which the Court also overruled the aforesaid motion of the defendants for a new trial, the parts so stricken by said order of the court from said conclusions of facts and conclusions of law being in words and figures, as follows:

"* * * nor is any property so included which abuts Arsenal Street, and the sewer therein, for a distance of 1000 feet, more or less, from the West line of Kingshighway, westwardly along said Arsenal Street."

119 And the defendants then and there at the time duly excepted to the action of the Court in making and entering said last mentioned order, and further then and there at the time duly and separately excepted to the action of the Court in modifying its said conclusions of facts and conclusions of law as aforesaid, and further then and there at the time duly and separately excepted to the action of the Court in confirming in all other respects its said conclusions of facts and conclusions of law as aforesaid, and further then and there at the time duly and separately excepted to the action of the Court in overruling the aforesaid motion of the defendants for a new trial.

And now, and during the same term and in due time, in order that the aforesaid matters and things may appear and become part of the record, the defendants present this their bill of exceptions and pray that the same may be duly signed and sealed and filed herein

and made a part of the record herein, all of which is done on the second day of June, 1911, and during said term and in due time.

HUGO MUENCH, [SEAL.]
Judge of the Circuit Court, City of St. Louis, Division No. 3.

6-2-11.

This bill is correct.

A. R. & HOWARD TAYLOR,
Attorneys for Plaintiff.

Filed June 2, 1911.

CHAS. R. GRAVES,
Circuit Clerk.

Respectfully submitted,

DAVID GOLDSMITH,
Attorney for Appellants.

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123 And thereafter, on the 6th day of July, 1915, the following further proceedings were had and entered of record in said cause, to-wit:

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY,
Respondent,

vs.

DAVID GOLDSMITH, REBECCA LOTH, ESTHER I. GOLDSMITH, AMELIA GOLDSMITH, and ROSE GOLDSMITH, Appellants.

Appeal from the Circuit Court, City of St. Louis.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellants its costs and charges herein expended and have therefor execution. (Opinion filed.)

Which said opinion is in the words and figures following, to-wit:

124 In the Supreme Court of Missouri, Division Two, April Term, 1915.

No. 16697.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY,
Respondent,

vs.

DAVID GOLDSMITH, REBECCA LOTH, ESTHER I. GOLDSMITH, AMELIA GOLDSMITH and ROSE GOLDSMITH, Appellants.

Statement.

This is a suit to enforce the lien of a special tax bill of $1,297.60 for the construction of sewers. Plaintiff had judgment for $1,394.83, and defendants have appealed.

The property has a front of 486 feet 1.1/2 inches on the west side of Kingshighway Boulevard, with a depth of 171 feet, bounded north by Bischoff Avenue and south by Old Manchester Road. About a quarter of a mile south of defendants' land is Tower Grove Park fronting west on the east side of said boulevard, and extending south 1,477 feet to Arsenal Street. The entrance to the park is about nine hundred feet north of Arsenal Street. The topography of the park is such that the surface water from the southwest part of it as far north as the drives near the entrance flow- southeastward away from said boulevard. That part of the park north of the entrance from a distance of about six hundred feet east slopes gradually to the

west. What if any northern slope it has is not shown, except that the boulevard has a very gradual slope north from Arsenal
125 Street to Bischoff Avenue.

In 1904 the City established Manchester Road Joint Sewer District and caused a joint sewer about a mile and a half long to be constructed in the northern and lower part of the district. That sewer is nine feet in diameter at its east end and half that diameter at its west end. It is five and a half feet in diameter on Bischoff Avenue where it passes along the north end of the defendants' property. Opposite defendants' property across the boulevard is "Shaw School," and east of that are the extensive grounds of the Missouri Botanical Garden. The plat of that joint sewer district is before us, and a rough estimate shows that about eighty acres of the park and about a hundred and twenty-five acres of the Botanical Garden are in that joint sewer district.

In 1905 the City established Manchester Road Sewer District Number Three, and provided for the construction of sewers therein. It is for that construction that the taxes herein are sued for. That district Number Three as shown by the plat lies on both sides of the boulevard. On the west side it extends from Arsenal Street to Bischoff Avenue, but on the east side the lands of the park and of the Botanical Garden are left out. All other tracts within about 670 feet of the boulevard and on the east thereof are in the district. Among the district sewers thus constructed is one in the boulevard form Arsenal Street to Bischoff Avenue. It is twenty-five inches in diameter at Arsenal Street, twenty-seven and a half inches in diameter at the park entrance and at the northwest corner of the park. It is four feet two inches in diameter in front of the defendants' property and empties into the joint district sewer at Bischoff Avenue. A sewer twenty-five inches in diameter was laid in Old Manchester Road from the sewer in the boulevard west along defendants' south boundary. A fountain and a hydrant are in the park near the
126 entrance. Before the construction of the sewer the water from the fountain and the hydrant and from the gutters in the park passed through a pipe under the boulevard into a gulley on the west side. The water now flows into the sewer near the entrance. The evidence does not show when nor by whom that connection was made. Plaintiff testified it was not made when the sewer was laid.

The evidence does not show how much water from any source enters the sewer from the park. There is a "guard house" near the entrance. It does not appear how large that structure is, *now* whether it has sewer connection.

Defendants read in evidence the deed from Henry Shaw donating the park to the city subject to the provisions as to the two hundred feet strip around and within the park. We do not deem it necessary to state those provisions or to consider them in this connection. Nearly all the land in said sewer district Three is subdivided into lots and blocks. Defendants' property is about two acres in extent, but is not divided into lots.

The park has no connection with said sewers except as shown above.

The answer alleged that the west end of the park extending east

about a thousand feet is as much benefitted by the construction of the sewers as any land in the district, and that it was left out of the district by the City and its officers in order that and with the intent that it should not be charged with its proportion of the cost of construction, and that such acts and proceedings were oppressive and arbitrary, and unfairly discriminated in favor of the city and against the owners of the land in the district, denying to such owners the equal protection of the laws contrary to the fourteenth amendment of our national constitution.

127 *Opinion.*

The sole controversy here is, whether the City acted unreasonably and arbitrarily when it left the lands of the park out of sewer district Number Three. We have concluded that such act was not unreasonable nor arbitrary.

Ordinarily sewers are for the purpose of carrying away sewage or surface water or both. It is not shown that any sewage originates or ever will originate in the park. There is no substantial showing that the sewer conducts away from the park any considerable amount of surface water. Its diameter of twenty-seven and a half inches shows that it is not constructed for the purpose of conducting away the surface water of the park.

Prior v. Construction Company, 170 Mo. 439, was a suit brought to restrain the construction of a joint district sewer. It was there held that the dominant owner could not be compelled to pay for sewers to carry the surface water from his land away from the servient tracts, but that he could be compelled to pay his proportion of the costs of a sewer to carry away his sewage. The park is the dominant tract as to surface water. The City is legally under no obligation to any one to gather up that water and conduct it away from the servient tracts. We do not say that such fact, alone and of its self, should have moved the City to leave the whole of the park out of the sewer district; but it was a fact proper to be considered in that connection.

In Kansas City v. Bacon, 147 Mo. 259, it was held that the use of land for a park is a public use for which land can be condemned under the law of eminent domain, and also that such park is a local improvement for which benefit assessments may be made against property within the benefit district. There is no evidence upon the point, but we have a right to presume that the
128 park largely increases the value of fedendants' lands. That increase comes as the result of the beneficence of a public spirited citizen and not by any effort of defendants. For the cost of constructing the large joint district sewer the city paid on eighty acres of the park and the Botanical Garden paid on a hundred and twenty-five acres, while defendants paid on only two acres. And yet, from the very nature of the park and of the garden, the uses which they will make of the sewer is trifling in comparison with that of lands used for building purposes. The municipal assembly doubtless considered all those facts and came to the conclusion that

it had done enough for the sewers in the vicinity of the park. The lands of the Botanical Garden were left out of District Three just as the park was, and yet the City was not responsible for the Botanical Garden's proportion of the taxes. In that respect the City appeared to be actuated by other than selfish motives. The fact that some water from near the park entrance has been turned into the sewer since its construction does not affect the case. It was held in Homan v. Allen, 156 Mo. l. c. 542, that turning water into a sewer from twenty-five acres of land not originally in the district did not affect the rights of the holder of the tax bill.

The judgment is affirmed.

Williams, C. concurs.

REUBEN F. ROY,
Commissioner.

Per Curiam.

The foregoing opinion of Roy, C. is adopted as the opinion of the Court. Faris, P. J. and Walker, J. concur, Brown, J. dubitante.

129 And thereafter, on the 14th day of July, 1915, the following further proceedings were had and entered of record in said cause, to-wit:

No. 16697.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY,
Respondent,

vs.

DAVID GOLDSMITH et al., Appellants.

Come now the said appellants, by attorney, and file their motion for a rehearing herein.

Which said motion for a rehearing is in the words and figures following, to-wit:

130 In the Supreme Court of Missouri, Division No. 2.

No. 16697.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, Respondent.

v.

DAVID GOLDSMITH, REBECCA LOTH, ESTHER I. GOLDSMITH, AMELIA GOLDSMITH and ROSE GOLDSMITH, Appellants.

Motion of Appellants for a Rehearing.

Now come the appellants, and move the Court to grant them a re-hearing in the above entitled cause, and for grounds of this motion show:

(1) That a question decisive of the case, and duly submitted by counsel, has been overlooked by the Court, namely, the principal contention of the appellants in their brief, to the effect that the special findings of the trial Court were not responsive to the issues in this cause, and did not warrant the judgment in this cause.

(2) That the opinion of this Court is not based upon the special findings of the Circuit Court, but is predicated upon findings and deductions of fact made by this Court, and that, in making such findings and deductions, this Court contravened the established right of the appellants to have the facts determined by a jury, or a Court sitting as a jury.

(3) That in its opinion this Court has, moreover, overlooked decisive facts either found by the trial Court or conclusively established by the evidence, namely, the fact that a part of the property mentioned in the opinion as Tower Grove Park was not used or usable for park purposes, but was reserved for and could legally only be used for residence purposes, and furthermore the fact that the drainage of surface water from the said park to Kingshighway Boulevard was not merely natural drainage, but was artificial drainage, effected through gutters extending through the park for a distance of six hundred feet east of Kingshighway, and the further fact that the ordinances of the City of St. Louis, shown in evidence, required the building on said park property to be connected with Manchester District Sewer Number Three.

(4) That, in its said opinion, the Court also misconceived other facts, which it treated as material, and made deductions of fact not warranted by the record, as will more fully appear from the brief filed in support of this motion.

DAVID GOLDSMITH,
Attorney for Appellants.

NOTE.—(Copy of notice of the filing of said motion and acceptance of service thereof, are attached to the original motion.)

131 And thereafter, on the 17th day of July, 1915, the following further proceedings were had and entered of record in said cause, to-wit:

No. 16697.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY,
Respondent,

vs.

DAVID GOLDSMITH et al., Appellants.

Now at this day, the Court having fully considered and understood the motion of the said appellants for a rehearing herein, doth order that said motion be, and the same is hereby sustained.

132 And thereafter, on the 9th day of October, 1917, the following further proceedings were had and entered of record in said cause to-wit:

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY,
Respondent,

vs.

DAVID GOLDSMITH, REBECCA LOTH, ESTHER I. GOLDSMITH, AMELIA GOLDSMITH, ROSE GOLDSMITH, Appellants.

Appeal from the Circuit Court of St. Louis City.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of St. Louis City rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellants its costs and charges herein expended and have therefor execution. (Opinion filed.)

Which said opinion is in the words and figures following, to-wit:

133 In the Supreme Court of Missouri, Division Two, October Term, 1917.

No. 16697.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, Respondent,

v.

DAVID GOLDSMITH, REBECCA LOTH, ESTHER I. GOLDSMITH, AMELIA GOLDSMITH and ROSE GOLDSMITH, Appellants.

This is a suit to enforce the lien of a special tax bill of $1297.60 for the construction of sewers. Plaintiff had judgment for $1394.83, and defendants have appealed.

The property has a front of 486 feet 1½ inches on the west side of Kingshighway Boulevard, with a depth of 171 feet, bounded north by Bischoff Avenue and south by Old Manchester Road. About a quarter of a mile south of defendant's land is Tower Grove Park fronting west on the east side of said boulevard, and extending south 1477 feet to Arsenal Street. The entrance to the park is two hundred feet wide, the south side of the entrance being about eight hundred feet from the southwest corner of the park. The park drive from the entrance runs west about 300 feet before it divides. There is no further showing by the evidence as to the location of the park drives. There are gutters along the park drives, but the evidence does not show any other gutters in the park.

Edwin Jolly, city engineer of grades and surveys, a witness for defendants, stated that by reason of a depression in the south-
134 west part of the park the surface water of the park flowed north about 600 feet to the north side of the park, and that the middle of such depression is about 200 feet from Kingshighway. Beyond that the park rises to the east. At another place in his testimony he said, "The head of this sag is right here at the south side of the park entrance." That part of the park north of the entrance and for a distance of 600 feet east has a fall of 18 feet west to Kingshighway. What if any northern slope it has is not shown except that Kingshighway has a very gradual slope to the north along the entire front of the park.

In 1904 the City established Manchester Road Joint Sewer District and caused a joint sewer about a mile and a half long to be constructed in the northern and lower part of the district. That sewer is nine feet in diameter at its east end and half that diameter at its west end. It is five and a half feet in diameter on Bischoff Avenue where it passes along the north end of defendants' property. Opposite defendants' property across the boulevard is "Shaw School," and east of that are the extensive grounds of the Missouri Botanical Garden. The plat of that joint sewer district is before us, and a rough estimate shows that about eighty acres of the park and about

a hundred and twenty-five acres of the Botanical Garden are in that joint district.

In 1905 the City established Manchester Road Sewer District Number Three, and provided for the construction of sewers therein. It is for that construction that the taxes herein are sued for. That district Number Three as shown by the plat lies on both sides of the boulevard. On the west side it extends from Arsenal Street to Bischoff Avenue, but on the east side the lands of the park and of the Botanical Garden are left out. All other tracts within about 670 feet of the boulevard and on the east thereof are in the district. Among the district sewers thus constructed is one in 135 the boulevard from Arsenal Street to Bischoff Avenue. It is twenty-five inches in diameter at Arsenal Street, Twenty-seven and a half inches in diameter at the park entrance and at the northwest corner of the park. It is four feet two inches in diameter in front of defendants' property and empties into the joint district sewer at Bischoff Avenue. A sewer twenty-five inches in diameter was laid in Old Manchester Road from the sewer in the boulevard west along defendants' south boundary. A fountain and a hydrant are in the park near the entrance. Before the construction of the sewer the water from the fountain and hydrant and from the gutters in the park passed through a pipe under the boulevard into a gulley on the west side. The water now flows into the sewer near the entrance. The evidence does not show when or by whom that connection was made. Plaintiff testified it was not made when the sewer was laid.

The evidence does not show how much water from any source enters the sewer from the park. There is a "guard house" near the entrance. It does not appear how large that structure is, nor whether it has sewer connection.

Nearly all the land in said sewer district is subdivided into lots and blocks. Defendants' property is about two acres in extent but is not subdivided into lots and blocks.

The park has no connection with said sewers except as shown above. The answer alleges that the west end of the park extending east about a thousand feet is as much benefited by the construction of the sewers as any land in the district, and that it was left out of the district by the city and its officers with the intent on their part that it should not be charged with its proportionate part of the cost of the sewer, and in the intentional disregard on the part of the city of its duties and the rights of the defendants and other owners of property in said district.

The cause was tried without a jury, and the court stated its 136 finding of facts and conclusions of law in writing which included the following:

"That with the exception of an area composing some 300 feet each way, and located at the southwestern corner of Tower Grove Park, the western part of said Park for a distance of some 600 feet east of

Kingshighway is of an elevation higher than said Kingshighway between Arsenal Street and Magnolia Avenue, and the natural drainage thereof is in the main westwardly towards said Kingshighway, and the Court does further find that before the building of the sewer in question, surface water and hydrants drained from said part of the Park, through drains and gutters, under said street and sidewalk, to a point west of Kingshighway; that whatever drains for surface and hydrant water now exist in said western and northwestern portion of said Park lead into that section of the sewer in question, situated in Kingshighway adjoining said Park, but the Court is unable to determine from the evidence as to when such connection with said sewer was accomplished, or by whom.

"I do also find that at the time the work in question was performed it was provided by the Revised Ordinances of the City of St. Louis that water draining from roofs of houses should not flow over sidewalks, but should be conducted through pipes to a sewer, if available, and if not, then such water should be conducted through pipes below the sidewalk, and into the open gutter of the street.

"And the Court does not find from the evidence that it is not possible or feasible to drain the surface water now falling upon or collected from that portion of Tower Grove Park, and the reserved strip of 200 feet, which is higher than and inclined towards Kingshighway, from the surface of said land in any other manner than through or by the district sewer constructed in Kingshighway,
137 or that seweage from houses upon said reserved strip, if any there ever be, cannot be disposed of by means other than said sewer.

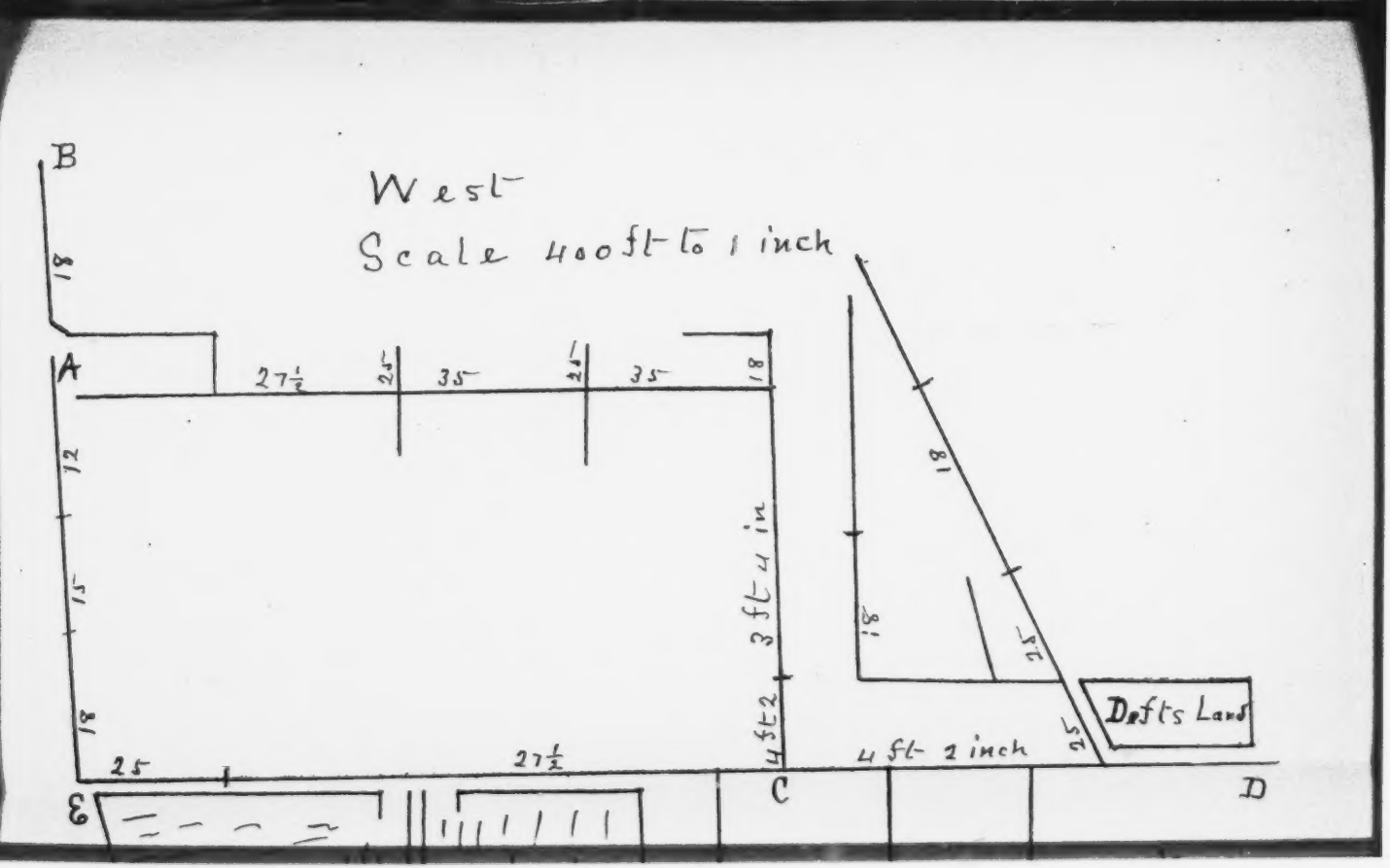
"Conclusions of Law.

"Finding the facts as aforesaid, the Court concludes as a matter of law, that it was within the powers of the Municipal Assembly, in the passage of Ordinances establishing the sewer district wherein the work sued for was performed, to embrace and designate therein only such real estate as, in its judgment, would be benefited thereby, and that the discretion vested in said Municipal Legislature is not subject to review by this Court, unless the powers of said Legislature were affirmatively shown to have been exercised fraudulently, oppressively or arbitrarily. (Prior v. Construction Co. 170 Mo. 440; Herman v. Schulte, 166 Mo., l. c. 416; Herman v. Allen, 156 Mo., l. c. 550.) And it is further concluded, as a matter of law, from the precedent facts, that the mere omission of lands from said district, which might, at one time, be reasonably included in the sewer district in question, or as to which it is reasonable to assume that the same would more conveniently be served by the sewer in question than any other, does not justify the Court in concluding that the Municipal Assembly, in omitting said lands from the sewer district in question, was actuated by motives of fraud or oppression; or that

the prima facie liability of defendants (Sec. 25, Art. VI. Charter of City) established by the certified special tax bill is thereby rebutted and overturned."

We here insert a plat which we have made in order that there may be a clear understanding of the facts as they appear.

(Here follows plat marked p. 138.)


B
West
Scale 400 ft to 1 inch
18
A
27½
25
35
25
35
18
12
15
18
25
27½
3 ft 4 in
4 ft 2
18
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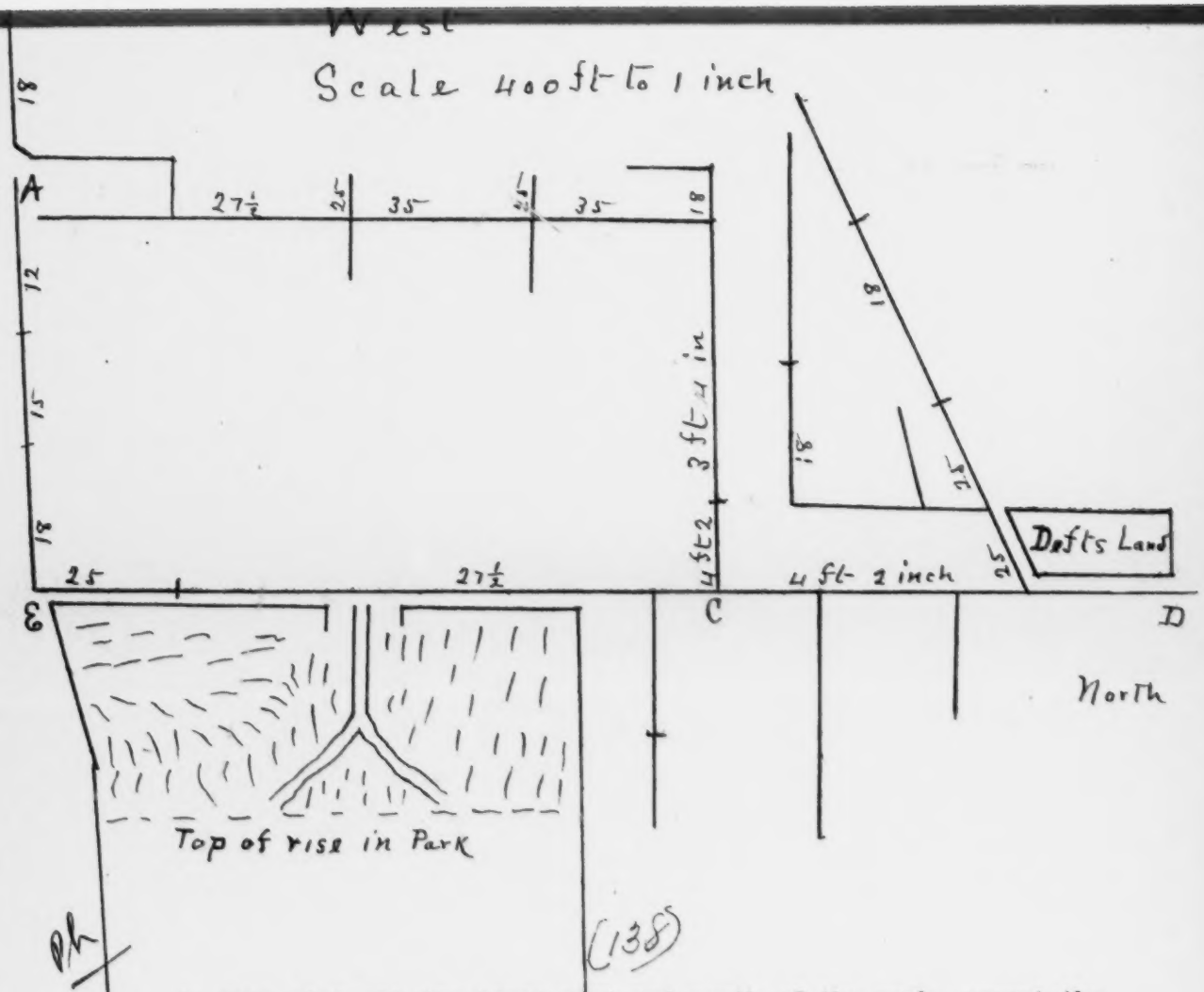
25
25
Defts Land
4 ft 2 inch
C
D
E



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(138)

On this plat all the lines west and north of the park, except the boundary lines of defendants' land, represent sewers. The sewer from E on the south to D on the north in front of the park is on Kingshighwy.

We have not shown the lots, blocks and streets except as they may appear from the line of the sewers. The direction of the flow of surface water in the park, so far as shown by defendants' evidence, is shown by lines on the plat. The evidence does not locate the park drives except from the entrance east 300 feet to the place where the drive divides. The short lines across the lines of the sewers show where there are changes in the size of the sewers.

139 There is no showing of any fraud, oppressiveness or arbitrariness on the part of the city except such, if any, as may be drawn from the face of the proceedings in the light of the evidence stated.

Opinion.

The appellants in their briefs say:

"The trial Court in its findings, which are conclusive, stated, and the entire evidence shows, that the surface waters from the whole of the western 600 feet of the park, with the exception of about 300 feet square in the extreme southwest corner, and accordingly the surface water from a frontage of about 1170 feet on Kingshighway (the entire frontage being 1470 feet) by a depth of about 600 feet, drained naturally into Kingshighway, that, for many years prior to the construction of the district sewer in question, this surface water was collected by gutters along the driveways in the park, and carried, first, into inlets in Kingshighway, and thence through underground pipes into a ravine on the western side of Kingshighway; and that upon or since the construction of the sewer these drains have been connected with, and the surface waters accordingly drained into, the sewer. The land from which these waters come is shown by the testimony of the city's own engineer of grades and surveys (Appellant's Abstract, p. 57) to have a fall of eighteen feet or more in six hundred, or of nearly one foot in twenty, which is certainly very unusual in the City of St. Louis. The evidence, therefore, warranted the conclusion that the amount of these surface waters was unusually heavy; at all events, it showed that the surface water thus drained included all the surface water
140 from that part of the park. What more was it practically possible to show? How could the amount have been measured?"

We think that statement shows a misunderstanding of the Court's finding of facts and that most if not all of the contentions of appellants here grow out of such misapprehension. The trial court did not make any such broad finding of facts in favor of defendants as they claim. There is no finding, as claimed by appellants, that all the east 600 feet of the park except the 300 feet square drains naturally into Kingshighway. The trial court merely found that "the natural drainage thereof is in the main westwardly towards Kingshighway." Defendants' witness Jolly proved that for a distance of six or eight hundred feet north and south just inside the park the surface water flows south and not west, and that it, consequently, does not get into Kingshighway.

The trial Court does not find that, prior to the construction of the sewer, all the water on the east portion of the park was collected in gutters along the park driveways and carried under Kingshighway into a ravine as claimed by appellant. It only says, "surface water and hydrants drained from said part of the park, through drains and gutters, under said street and sidewalk, to a point west of Kingshighway."

Neither does the trial court find that all the surface water of that part of the park is now collected into such gutters and thence discharged into such sewer. It merely says: "Whatever drains for surface water and hydrant water now exist in said western and northwestern portion of said park lead into that section of the sewer in question."

The accompanying plat shows that very little water, comparatively, from the park gets into the gutters along the park drives. It does not appear that any water from the prak gets into the sewer except that which passes from such gutters and the hydrant, and the trial court did not find that any water from the park gets
141 into the sewer except that from such gutters and the hydrant. That must be comparatively very little.

We call attention to the fact that a fall of eighteen feet in six hundred is not a fall of one foot in twenty as claimed by appellants, but only of one foot in about thirty three.

II.

The appellants contend that the trial court overlooked one fact conclusively shown by the evidence, namely, that the two hundred feet strip around and within the park is, by the terms of Shaw's deed to the city, required to be leased for residence purposes. It is sufficient for the purposes of this case, to say that from the beginning in 1868 the city has failed to conform to that part of the provision of the deed. Whether or not it ever will do so does not appear in this case. We take the situation as we find it and treat the whole tract as a park as the city seems to have done.

III.

Appellants call attention to their answer which alleges that the officers and representatives of the city omitted the park from the sewer district with the intent that it should thereby escape the payment of any portion of the cost of the sewer, and with the intentional disregard on the part of the city of its duties in the matter and of the rights of the defendants and other owners of lots in the district.

Appellants say that the findings of the trial court are not responsive to the issue thus raised by the answer and by the reply thereto.

142 But in their brief they say: "The finding upon which the judgment of the trial court is based, relates solely to the motives of the municipal assembly of the City of St. Louis and these motives are immaterial".

Without deciding the point as to whether such motives are material, we call attention to the fact that the finding of the court on the question of motives was in direct response to defendants' answer. The finding of the court as to an immaterial fact does not invalidate the findings provided the other facts found are sufficient to support the judgment.

IV.

Appellants contend that the trial court made no finding of fact as to whether the city acted fraudulently, oppressively or arbitrarily in the proceedings, and that such failure to find on that point is reversible error. They cite on that point Cochran v. Thomas, 131 Mo. 258, l. c. 268. The court was there speaking of the effect of a request by a party for a finding of the facts in accordance with the statute, and said:

"We are of the opinion that under this provision the court is required to find and state in writing, not only every constitutive fact in issue to which his attention is directed, but also separately the conclusions of law thereon in order that exceptions may be taken thereto".

Appellants overlook the language of the opinion in that case on page 278, where it is said:

"The statute requires the court, when requested by either party, to "state in writing the conclusions of facts found separately from the conclusions of law." Sec. 2135. Elliott, in his recent work on practice (sec. 975), gives this rule as one, in his opinion, 143 founded upon right principle: "If a special finding is silent on a material point it is deemed a finding against the party who has the burden of proof". This rule finds support in the decisions of the supreme court of Indiana. Railroad v. Hart, 119 Ind. 280; Bank v. Bolen, 121 Ind. 304". The judgment in that case was accordingly affirmed.

In this case the burden of proof was on defendants as to the point in question, and if the court failed to state its finding on that point it must be regarded as a finding against them.

V.

Appellants contend that, on the face of the record the action of the city should be held arbitrary and illegal. The foregoing plat shows that one sewer begins at A, runs east to the southwest corner of the park at E, thence north along the park front, and about 400 feet beyond to its confluence with another sewer, with a total length of about 3100 feet and a diameter of only 27.1/2 inches at its largest part. The size of that sewer was increased only once in its course along the park front, and that was at a point only about 400 feet from the southwest corner of the park, and defendants' evidence conclusively shows that no water gets into the sewer from the park within that 400 feet. What is more, it is not shown that the city made any provision for admitting the water from the park into the city sewer, and, so far as that showing goes, the amount of water that actually gets into the sewer from the park is negligible for the purposes of this case.

Another sewer begins at B and runs through a portion of the city where the land on both sides is in lots and blocks, and has streets, pavements and buildings. It runs a distance of about 3600 feet be-

fore reaching C, its junction with the first mentioned sewer. It has several short laterals. Its diameter for some distance before
144 and after getting to C is four feet and two inches. Its size was not increased because of its receiving the contents of the first mentioned sewer. It should be noted that while it is only about one sixth longer than the other sewer its capacity is about three times as great.

The city, in laying out the sewer district, had a right to consider the fact that nearly half the park front drained south and not into Kingshighway and that the other half was park grounds which absorb a large portion of the rainfall, unlike roofs and pavements which discharge all the water into the sewer. It had the right to consider that the park as the dominant tract was under no legal obligation to dispose of its surface water flowing therefrom in its natural direction. As said in the original opinion, these facts were not such as to necessarily control the city in its action, but they were entitled to consideration.

The points above decided together with those passed upon in the first opinion, we think, cover substantially all the case as presented by appellants.

Judgment of trial court affirmed.

REUBEN F. ROY,
Commissioner.

White, C., not sitting.

Per Curiam.

The foregoing opinion of Roy, C. is adopted as the opinion of the Court.

All concur.

145 And thereafter, on the 18th day of October, 1917, the following further proceedings were had and entered of record in said cause, to-wit:

No. 16697.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, Respondent,

vs.

DAVID GOLDSMITH et al., Appellants.

Come now the said appellants, by their attorney, and file their motion to transfer this cause to the Court en Banc.

Which said motion, together with notice to The George G. Prendergast Construction Company, of said motion, and the acceptance of service of said notice, attached to and filed with said motion for the transfer of said cause to the Court en Banc, are in words and figures as follows, to-wit:

146 In the Supreme Court of Missouri, Division No. 2.

No. 16697.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, Respondent,

vs.

DAVID GOLDSMITH, REBECCA LOTH, ESTHER I. GOLDSMITH, AMELIA GOLDSMITH and ROSE GOLDSMITH, Appellants.

Motion for Transfer of Cause to Court en Blanc.

Now come the appellants in the above-entitled cause, and move this Court to transfer this cause to the court en banc, and for grounds of this motion allege and say that a federal question is involved in this cause, and that they, the appellants, are the losing party.

And, in support of this motion, the appellants further respectfully show and state as follows:

That the answer filed by the appellants in the trial court specifically pleads as a defense that by the special tax bill in suit and the ordinance under which it was issued, "the defendants were denied the equal protection of the laws contrary to the provisions of the Constitution of the United States, to-wit, the Fourteenth Amendment of said Constitution, and were deprived of property without due process of law contrary to the provisions of said Constitution, to-wit, of said Fourteenth Amendment thereof" (Appellants' Abstract, page 14);

That the amount of the judgment of the trial court in this cause was only one thousand three hundred and ninety-four dollars and eighty three cents; that the amount of the judgment therefore, is insufficient to confer jurisdiction of the appeal herein upon this court; and that such jurisdiction rests upon and results exclusively from the existence of the aforesaid federal question;

147 That the retention of this cause, and the determination of it by this court, is a conclusive determination that this Court has jurisdiction of this appeal, and consequently that the appeal involves a federal question, since this Court could not otherwise entertain or determine the said appeal.

And that the fact that a federal question exists in this cause, is conclusively established by the decision of the Supreme Court of the United States in Myles Salt Co. v. Iberia Drainage District, 239 U. S. 1 c. 484, wherein that Court says:

"It is true the law of the state as written is not attacked, but the law as administered and justified by the Supreme Court of the state is attacked, and it is asserted to be a violation of the Constitution of the United States. The question presented is Federal and the motion to dismiss is denied."

Respectfully Submitted.

DAVID GOLDSMITH,
Attorney for all Appellants.

147½ In the Supreme Court of Missouri, Division No. 2.

No. 16697.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY,
Respondent,

vs.

DAVID GOLDSMITH, REBECCA LOTH, ESTHER I. GOLDSMITH, AMELIA GOLDSMITH and ROSE GOLDSMITH, Appellants.

To the Above Named Respondent and Its Attorneys of Record:

You are hereby notified that the above-named appellants will hereafter and in due time, to-wit, on the eighteenth day of October, 1917, file in the above-entitled cause a motion for the transfer of said cause to the court en banc, a copy of which said motion is hereto attached.

DAVID GOLDSMITH,
Attorney for all Appellants.

The undersigned hereby acknowledge due service on them this seventeenth day of October, 1917, of a copy of the above and foregoing notice and of the above and foregoing motion for the transfer of the above-entitled cause to the court en banc.

A. R. & HOWARD TAYLOR,
Attorneys for Respondent.

148 And thereafter, on the 16th day of February, 1918, the following further proceedings were had and entered of record in said cause, to-wit:

No. 16697.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY,
Respondent,

vs.

DAVID GOLDSMITH et al., Appellants.

Now at this day the Court having considered and fully understood appellants' motion to transfer this cause to Court en Banc. doth order that said motion be, and the same is hereby overruled.

149 In the Supreme Court, State of Missouri, Division No. 2.

No. 16697.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, Respondent,

vs.

DAVID GOLDSMITH, REBECCA LOTH, ESTHER I. GOLDSMITH, AMELIA GOLDSMITH and ROSE GOLDSMITH, Appellants.

To the Honorable W. W. Graves, Chief Justice of the Supreme Court of Missouri:

Now come David Goldsmith, Rebecca Loth, Esther I. Goldsmith, Amelia Goldsmith and Rose Goldsmith, appellants in the above-entitled cause, and allege that they are citizens of the United States; that the above-entitled cause was instituted in the Circuit Court of the City of St. Louis, State of Missouri; that said cause is a suit upon a special tax bill issued by said City of St. Louis for the construction of a joint district sewer in said city; that in said suit it is sought to charge said special tax as a lien upon land of the appellants situated and lying in said City of St. Louis, and described in the petition in said suit; that the above-entitled cause was tried in said Circuit Court for said City of St. Louis; that on the trial thereof said Circuit Court heretofore, to-wit, on the third day of April, 1919, rendered judgment in said cause in favor of the respondent; that thereupon the appellants were granted and duly took an appeal from said judgment to the Supreme Court of Missouri; that the Supreme Court
150 of Missouri heretofore, to-wit, on October 9th, 1917, rendered judgment, affirming the aforesaid judgment of the Circuit Court of the City of St. Louis; that thereupon, to-wit, on the eighteenth day of October, 1917, the appellants filed a motion in said cause, praying that said cause should be transferred to the Court en banc, but that said motion was heretofore, to-wit, on the sixteenth day of February, 1918, over-ruled by said Supreme Court of Missouri, and that thereupon the aforesaid judgment of the Supreme Court of the State of Missouri was a final judgment.

That in and by their answer in the above-entitled cause the appellants pleaded as a defense to said tax bill that said city of St. Louis willfully and arbitrarily omitted from the district for said joint district sewer, for which said special tax bill was issued, land of said city which was benefitted by the sewer, and should have been included in said district; that this was done with the intent that the land of said city so omitted should not be assessed or charged with any part of the cost of said sewer, and that, in point of fact, said land was not, nor was any part thereof, assessed or charged with any part of said cost; that all this was done in intentional disregard of the duties of said city in the premises; that said proceedings were arbitrary and discriminated unjustly and unfairly and willfully against the own-

ers of land included in said district, including these appellants; and that by said proceedings, and the aforesaid matters and things, and especially the ordinance establishing said sewer district, and the assessment of the cost of said sewer, and the special tax bill sued upon as aforesaid, the appellants were denied the equal protection of the laws, contrary to the provisions of the Constitution of the United States, to-wit, the Fourteenth Amendment of said Constitution, and were deprived of property without due process of law, contrary
151 to the provisions of said Constitution, to-wit, of said Fourteenth Amendment thereof;

That in the above-entitled cause there was and is drawn in question the validity of authority exercised under a statute of the State of Missouri, to-wit, the validity of authority exercised under Article VI (6) of the Charter of the City of St. Louis, a city located in said State of Missouri, and the validity of an ordinance enacted under and by virtue of said section, and of a special tax bill issued under said charter; that the validity of said authority so exercised was and is drawn in question in the above-entitled cause on the ground that the exercise thereof is repugnant to the Constitution of the United States, and especially the Fourteenth Amendment of said Constitution; that the above-mentioned judgment of said Supreme Court of the State of Missouri was and is a decision in favor of the validity of said authority; and that said Supreme Court of Missouri is the highest court of the State of Missouri which had jurisdiction of the matter thus drawn in question, and of the constitutional question thus raised;

That by the over-ruling of the aforesaid motion of the appellants for the transfer of this cause to the Court en banc, the appellants were denied the equal protection of the law, and were deprived of property without due process of law, all of which was and is contrary to the Constitution of the United States, to-wit, the Fourteenth Amendment of said Constitution;

And that prior to the rendition of said judgment of said Supreme Court of Missouri certain errors were committed in the proceedings in said cause, and in said judgment of said Supreme Court of Mis-
152 souri, all of which appears more in detail from the assignment of errors which is presented with this petition, and that, among said errors assigned in said assignment of errors, is the error of said Supreme Court of Missouri in over-ruling the aforesaid motion of appellants for the transfer of this cause to the Court en banc; and that said error in the over-ruling of said motion is complained of in said assignment of errors as repugnant to the Constitution of the United States on the grounds hereinbefore set forth.

Wherefore, your petitioners, the above-mentioned defendants and appellants, pray that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of the State of Missouri, and the judges thereof, to the end that the record in said cause may be removed to the Supreme Court of the United States, and that your petitioners may be allowed to bring up for review before the Supreme Court of the United States said judgment of the Supreme Court of Missouri; that citation be granted and signed,

that the bond herewith presented be approved and upon compliance with the terms of the Statute in such cases made and provided, said bond and writ of error may operate as a supersedeas; and your petitioners further pray that the errors complained of by your petitioners may be examined and said judgment of the Supreme Court of the State of Missouri may be reversed; and that your petitioners may have such other and further relief as in the premises may be just and proper; and your petitioners will ever pray.

DAVID GOLDSMITH,
REBECCA LOTH,
ESTHER I. GOLDSMITH,
AMELIA GOLDSMITH, AND
ROSE GOLDSMITH,
By DAVID GOLDSMITH.
Their Attorney.

153 The writ of error as prayed for in the above entitled cause is hereby allowed this seventeenth day of April, 1918, the Writ of Error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of six thousand dollars.

Dated at Jefferson City, Missouri, this seventeenth day of April, 1918.

W. W. GRAVES.
Chief Justice of the Supreme Court of Missouri.

Filed in my office this 17th day of April, 1918.

J. D. ALLEN,
Clerk of the Supreme Court of Missouri.

[Endorsed:] Filed Apr. 17, 1918. J. D. Allen, Clerk Supreme Court. David Goldsmith, Attorney-at-Law, Suite 1516 Federal Reserve Bank Building, Saint Louis.

154 In the Supreme Court of Missouri.

No. 16,697.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY,
Respondent,

vs.

DAVID GOLDSMITH, REBECCA LOTH, ESTHER I. GOLDSMITH, AMELIA GOLDSMITH and ROSE GOLDSMITH, Appellants.

Now come David Goldsmith, Rebecca Loth, Esther I. Goldsmith, Amelia Goldsmith and Rose Goldsmith, defendants and appellants in the above-entitled cause, and, in connection with the petition for a writ of error herein, make the following assignment of errors,

which they aver occurred in the judgment of the Supreme Court of Missouri, which said judgment was rendered on the ninth day of October, in the year one thousand nine hundred and seventeen, and in the over-ruling of the motion of said appellants for the transfer of said cause to the court en banc, said motion having been overruled on the sixteenth day of February, in said year; and as and for said assignment of errors they respectively aver and say:

(1) That the Circuit Court of the City of St. Louis failed to determine the defense pleaded in the answer in the above entitled cause, that by the alleged ordinances, and the assessment mentioned in said answer, and the special tax bill sued upon, the defendants were denied the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, and were deprived of property without due process of law, contrary to the provisions of said Fourteenth Amendment; and that the Supreme Court of Missouri erred in not holding that said Circuit Court committed error in failing to determine said defense;

(2) That the Supreme Court of Missouri erred in not taking cognizance of the aforesaid constitutional defense, namely, the defense that by said alleged ordinances, and said assessment
155 and said special tax bill, the defendants were denied the equal protection of the laws and were deprived of property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States;

(3) That the Supreme Court of Missouri, erred in not determining the aforesaid constitutional defense, namely, the defense that by said alleged ordinances, and said assessment and said special tax bill, the defendants were denied the equal protection of the laws, and were deprived of property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States;

(4) That the Supreme Court of Missouri erred in failing to hold that by the said alleged ordinances, said assessment and said special tax bill, the defendants were denied the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States;

(5) That the Supreme Court of Missouri erred in failing to hold that by the said alleged ordinances, said assessment and said special tax bill, the defendants were deprived of property without due process of law, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States;

(6) That the Supreme Court of Missouri erred in affirming the judgment of said Circuit Court in this cause;

(7) That the Supreme Court of Missouri erred in not reversing the judgment of said Circuit Court;

(8) That by over-ruling the motion of the appellants for the transfer of this cause to the court en banc the Supreme Court of Mis-

souri denied the appellants the equal protection of the laws,
156 contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States;

(9) That by over-ruling the motion of the appellants for the transfer of this cause to the court en banc the Supreme Court of Missouri deprived the appellants of property without due process of law, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

Wherefore, the said David Goldsmith, Rebecca Loth, Esther I. Goldsmith, Amelia Goldsmith and Rose Goldsmith, pray that said judgment of the Supreme Court of Missouri may be reversed, annulled and altogether for naught held, and that they may be restored to all things which they have lost by reason of said judgment of the Supreme Court of Missouri.

DAVID GOLDSMITH,
REBECCA LOTH,
ESTHER I. GOLDSMITH,
AMELIA GOLDSMITH, AND
ROSE GOLDSMITH,
By DAVID GOLDSMITH,
Their Attorney.

[Endorsed:] Filed Apr. 17, 1918. J. D. Allen, Clerk Supreme Court. David Goldsmith, Attorney-at-Law.

157 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Missouri, before you or some of you at the October Term, A. D. 1917, thereof, between The George G. Prendergast Construction Company, Respondent, and David Goldsmith, Rebecca Loth, Esther I. Goldsmith, Amelia Goldsmith and Rose Goldsmith, Appellants, a manifest error hath happened to the great damage of the said Appellants, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, District of Columbia, on the 17th day of May next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to

correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 17th day of April, in the year of our Lord one thousand nine hundred and eighteen.

[Seal of the United States District Court, Central Division, Western District, of Missouri.]

JOHN B. WARNER,
Clerk of the District Court of the United States for the Central Division of the Western District of Missouri,
By H. C. GEISBERG,
Deputy.

Allowed by
W. W. GRAVES,
Chief Justice of the Supreme Court of Missouri.

158 (Copy.)

Know all men by these presents; That we, David Goldsmith, Rebecca Loth, Esther I. Goldsmith, Amelia Goldsmith and Rose Goldsmith, as principals, and Jacob Loth and Nathan Bry, of St. Louis, Missouri, as sureties, are held and firmly bound unto The George G. Prendergast Construction Company, in the full and just sum of Six Thousand Dollars, to be paid to the said The George G. Prendergast Construction Company, or its certain attorneys, executors, administrators, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this seventeenth day of April, in the year of our Lord one thousand nine hundred and eighteen.

Whereas, lately at the Supreme Court of Missouri in a suit pending in said court, between The George G. Prendergast Construction Company, as Plaintiff and Respondent, against David Goldsmith, Rebecca Loth, Esther I. Goldsmith, Amelia Goldsmith and Rose Goldsmith, as Defendants and Appellants, being Cause No. 16697 in said Supreme Court of Missouri, a final judgment was rendered against the said David Goldsmith, Rebecca Loth, Esther I. Goldsmith, Amelia Goldsmith and Rose Goldsmith, and the said David Goldsmith, Rebecca Loth, Esther I. Goldsmith, Amelia Goldsmith and Rose Goldsmith have obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The George G. Prendergast Construction Company, citing and admonishing it to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the

said David Goldsmith, Rebecca Loth, Esther I. Goldsmith, Amelia Goldsmith and Rose Goldsmith, shall prosecute said writ of
159 error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

In witness whereof, the said David Goldsmith, Rebecca Loth, Esther I. Goldsmith, Amelia Goldsmith and Rose Goldsmith, as principals, and Jacob Loth and Nathan Bry, as sureties, have hereunto set their hands and seals, the day and year above written.

DAVID GOLDSMITH.	[SEAL.]
REBECCA LOTH.	[SEAL.]
ESTHER I. GOLDSMITH.	[SEAL.]
AMELIA GOLDSMITH.	[SEAL.]
ROSE GOLDSMITH.	[SEAL.]
JACOB LOTH.	[SEAL.]
NATHAN BRY.	[SEAL.]

The foregoing bond is satisfactory.

A. R. & HOWARD TAYLOR,
Att'ys for Resp't.

The foregoing supersedeas bond is approved by

W. W. GRAVES,
Chief Justice of the Supreme Court of Missouri.

[Endorsed:] Filed Apr. 17, 1918. J. D. Allen, Clerk Supreme Court.

160 In the Supreme Court of the State of Missouri, Division Number Two.

No. 16697.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY,
Respondent,

vs.

DAVID GOLDSMITH, REBECCA LOTH, ESTHER I. GOLDSMITH, AMELIA GOLDSMITH and ROSE GOLDSMITH, Appellants.

The above entitled cause coming on to be heard upon the petition of the appellants therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, and upon examination of said petition and the record in said matter, and desiring to give the petitioners an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter:

It is ordered that a writ of error be, and is hereby allowed to this court from the Supreme Court of the United States, and that the

bond presented by said petitioners be and the same is hereby approved, and that said Writ of Error and Bond shall act as a supersedeas and stay execution.

Jefferson City, Missouri, April 17th, 1918.

W. W. GRAVES,
Chief Justice of the Supreme Court of Missouri.

[Endorsed:] Filed Apr. 17, 1918. J. D. Allen, Clerk Supreme Court. David Goldsmith, Attorney-at-Law, Suite 1516, Federal Reserve Bank Building, Saint Louis.

161 UNITED STATES OF AMERICA, *ss:*

To the George G. Prendergast Construction Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of Missouri, in cause No. 16,697, pending in said Court, wherein David Goldsmith, Rebecca Loth, Esther I. Goldsmith, Amelia Goldsmith and Rose Goldsmith are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. W. Graves, Chief Justice of the Supreme Court of Missouri, this seventeenth day of April, in the year of our Lord one thousand nine hundred and eighteen.

W. W. GRAVES,
Chief Justice of the Supreme Court of Missouri.

UNITED STATES OF AMERICA,
State of Missouri, ss:

Due service of the above and foregoing citation is hereby acknowledged and accepted on this 20th day of April, 1918, for and on behalf of the aforesaid The George G. Prendergast Construction Company, defendant in error in the above-mentioned writ of error.

A. R. TAYLOR AND
HOWARD TAYLOR,
Attorneys for The George G. Prendergast Construction Company, Defendant in Error.

[Endorsed:] Filed Apr. 24, 1918. J. D. Allen, Clerk Supreme Court. David Goldsmith, Attorney-at-Law, Suite 1516, Federal Reserve Bank Building, Saint Louis.

162 In the Supreme Court of Missouri.

No. 16697.

DAVID GOLDSMITH, REBECCA LOTH, ESTHER I. GOLDSMITH, AMELIA GOLDSMITH and ROSE GOLDSMITH, Plaintiffs in Error (Formerly Appellants),

vs.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, Defendant in Error (Formerly Respondent).

To Honorable J. D. Allen, Clerk of the Supreme Court of Missouri:

You will please include in the transcript of the record in the above-entitled cause, which is to be transmitted to the Supreme Court of the United States under the writ of error issued in said cause, the following mentioned documents, papers and entries, and you will please so include the same by original or copy, as may be proper, and in due order and form, namely:

(1) The short transcript filed in the Supreme Court of Missouri in said cause, being the transcript of the judgment of the Circuit Court of the City of St. Louis, and of the order granting the appeal from said judgment;

(2) The stipulation dated March 11th, 1914, and filed in the Supreme Court of Missouri on March 12th, 1914;

(3) The abstract of the record filed in the Supreme Court of Missouri in said cause by the present plaintiffs in error, who were formerly appellants;

163 (4) The opinion and judgment first rendered by said Supreme Court of Missouri in said cause, being the opinion and judgment rendered in the year nineteen hundred and fifteen;

(5) The motion for a re-hearing filed in said cause in said Supreme Court of Missouri by said former appellants, the same having been filed within ten days after the rendition of said first opinion and judgment;

(6) The order of said Supreme Court of Missouri sustaining said motion for a re-hearing;

(7) The opinion and judgment last rendered by said Supreme Court of Missouri in said cause, being the opinion and judgment rendered in October, in the year nineteen hundred and seventeen (1917);

(8) The motion for the transfer of said cause to the Court en banc, which was filed in said Supreme Court of Missouri in said cause by said former appellants after the rendition of said last mentioned

opinion and judgment, to-wit, in October, in the year nineteen hundred and seventeen (1917);

(9) The petition for writ of error, with allowance thereof, the assignment of errors presented therewith, the supersedeas bond, with approval thereof, the order granting said writ and approving said bond, the citation issued in said cause, with acknowledgment of service thereof, and this praecipe, with acceptance of service;

(10) All entries of record appertaining to the filing of any of the above-mentioned documents and papers.

DAVID GOLDSMITH,
Attorney for said Plaintiffs in Error.

Due service of the above and foregoing præcipe is hereby acknowledged and accepted this 23rd day of April, 1918, for and on behalf of the above-named, The George G. Prendergast Construction Company, defendant in error in the above titled cause.

R. TAYLOR &
HOWARD TAYLOR,
Attorneys for said The George G. Prendergast Construction Company, Defendant in Error.

[Endorsed.]

No. 16,697.

In the Supreme Court of Missouri.

David Goldsmith, Rebecca Loth, Esther I. Goldsmith, Amelia Goldsmith and Rose Goldsmith, Plaintiffs in Error, (Formerly Appellants),

vs.

The George G. Prendergast Construction Company, Defendant in Error, (Formerly Respondent).

Præcipe.

Filed Apr. 24, 1918.

J. D. Allen, Clerk Supreme Court.

164 In the Supreme Court of Missouri.

No. 16697.

DAVID GOLDSMITH, REBECCA LOTH, ESTHER I. GOLDSMITH, AMELIA GOLDSMITH and ROSE GOLDSMITH, Plaintiffs in Error (Formerly Appellants),

vs.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, Defendant in Error. (Formerly Respondent).

Amended Præcipe.

To Honorable J. D. Allen, Clerk of the Supreme Court of Missouri:

You are requested by this amended præcipe to include in the transcript of the record in the above-entitled cause, which is to be transmitted to the Supreme Court of the United States under the writ of error issued in said cause, the following mentioned documents, papers and entries, and you will please so include the same by original or copy, as may be proper, and in due order and form, namely:

(1) The short transcript filed in the Supreme Court of Missouri in said cause, being the transcript of the judgment of the Circuit Court of the City of St. Louis, and of the order granting the appeal from said judgment;

(2) The stipulation dated March 11th, 1914, and filed in the Supreme Court of Missouri on March 12th, 1914;

(3) The abstract of the record filed in the Supreme Court of Missouri in said cause by the present plaintiffs in error, who were formerly appellants;

(4) The opinion and judgment first rendered by said Supreme Court of Missouri in said cause, being the opinion and Judg-
165 ment rendered in the year nineteen hundred and fifteen;

(5) The motion for a re-hearing filed in said cause in said Supreme Court of Missouri by said former appellants, the same having been filed within ten days after the rendition of said first opinion and judgment;

(6) The order of said Supreme Court of Missouri sustaining said motion for a re-hearing;

(7) The opinion and judgment last rendered by said Supreme Court of Missouri in said cause, being the opinion and judgment rendered in October, in the year nineteen hundred and seventeen (1917);

(8) The motion for the transfer of said cause to the Court en banc, which was filed in said Supreme Court of Missouri in said cause by said former appellants after the rendition of said last mentioned opinion and judgment, to-wit in October, in the year nineteen hundred and seventeen (1917), also the notice to The George G. Prendergast Construction Company of said motion for the transfer of said cause to the court en banc, and the acceptance of the service of said notice;

(9) The order of the Supreme Court of Missouri overruling said last mentioned motion, to-wit, said motion for the transfer of said cause to the court en banc, which said order was entered under date of February sixteenth, 1918;

(10) The writ of error issued from the Supreme Court of the United States;

(11) The petition for writ of error, with allowance thereof, the assignment of errors presented therewith, the supersedeas bond, with approval thereof, the order granting said writ and approving said bond, the citation issued in said cause, with acknowledg-
166 ment of service thereof, the præcipe heretofore delivered to you with acknowledgment of service, and this amended præcipe and acceptance of service;

(12) All entries of record appertaining to the filing of any of the above-mentioned documents and papers.

The documents, papers and entries, thus to be included in said transcript of said record, embrace those which you were requested to include by the præcipe heretofore filed with you, and, furthermore, embrace the above-mentioned order over-ruling said motion for the transfer of said cause to the court en banc and the aforesaid writ of error, being the two foregoing items numbered, respectively, (9) and (10), and furthermore embrace the aforesaid notice of said motion for the transfer of said cause to the court en banc, and said acceptance of the service of said notice.

DAVID GOLDSMITH.
Attorney for said Plaintiffs in Error.

Due service of the above and foregoing amended præcipe is hereby acknowledged and accepted this 7th day of May, 1918, for and on behalf of the above-named, The George G. Prendergast Construction Company, defendant in error in the above-entitled cause.

A. R. TAYLOR,
Attorney for said The George G. Prendergast Construction Company, Defendant in Error.

[Endorsed.]

Cause No. 16,697.

In the Supreme Court of Missouri.

David Goldsmith, Rebecca Loth, Esther I. Goldsmith, Amelia Goldsmith and Rose Goldsmith, Plaintiffs in Error (Formerly Appellants),

vs.

The George G. Prendergast Construction Company, Defendant in Error (Formerly Respondent).

Amended Præcipe.

Filed May 9, 1918.

J. D. Allen, Clerk Supreme Court.

167 STATE OF MISSOURI, *set:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the foregoing transcript contains a full, true and complete copy of the record and proceedings in said Supreme Court in the cause entitled "The George G. Prendergast Construction Company, Respondent, vs. David Goldsmith, Rebecca Loth, Esther I. Goldsmith, Amelia Goldsmith and Rose Goldsmith, Appellants," No. 16697, as called for in the amended præcipe, and as the same appear of record and on file in my office, attached to which said transcript are petition for writ of error, with allowance thereof, assignment of errors presented therewith, said writ of error, a true copy of supersedeas bond, order granting said writ and approving said bond, citation issued in said cause with acknowledgment of service thereof, and præcipe and amended præcipe.

In testimony whereof, I have hereunto set my hand and attached the official seal of said Supreme Court of the State of Missouri, at my office in the City of Jefferson, State aforesaid, this 9th day of May, 1918.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court of the State of Missouri.

Endorsed on cover: File No. 26,577. Missouri Supreme Court. Term No. 127. David Goldsmith, Rebecca Loth, Esther I. Goldsmith et al., plaintiffs in error, vs. The George G. Prendergast Construction Company. Filed June 7th, 1918. File No. 26,577.

Office Supreme Court, U. S.
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JAMES D. MAHER,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

DAVID GOLDSMITH, REBECCA LOTH, ESTHER I. GOLDSMITH, AMELIA GOLDSMITH and ROSE GOLDSMITH,
Plaintiffs in Error,

vs.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY,
Defendant in Error.

No. 127.

BRIEF FOR PLAINTIFFS IN ERROR.

DAVID GOLDSMITH,
Attorney for Plaintiffs in Error.

St. Louis Law Printing Co., Ninth and Walnut Sts. Bell, Main 1819.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

DAVID GOLDSMITH, REBECCA LOTH, ESTHER I. GOLDSMITH, AMELIA GOLDSMITH and ROSE GOLDSMITH, *Plaintiffs in Error,* vs. THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, *Defendant in Error.*	No. 127.

BRIEF FOR PLAINTIFFS IN ERROR.

The present action was instituted for the enforcement of a special tax bill issued by the City of St. Louis, Missouri, for the construction of a district sewer in a district called the Manchester Road Sewer District No. 3. This tax bill, however, represents the smaller part of the assessment against the prop-

erty of the plaintiffs in error for the construction of that sewer. And here we may remark that the opinion of the Supreme Court of Missouri, which is contained in the record in this cause, sets forth an outline which purports to represent the property of the plaintiffs in error (Printed Rec., p. 76), but that this outline represents only the part of the property of the plaintiffs in error which is involved in the present action, and that the whole of the property of the plaintiffs in eror, as well as the whole of the part assessed for the sewer improvement, is shown in the two blue prints which are part of the record herein—one being a blue print of the sewer district in question, namely, Manchester Road Sewer District No. 3, and the other being a blue print of a joint sewer district known as the Manchester Road Joint Sewer District.

The trial court rendered judgment in favor of the original plaintiff in this action—The George G. Prendergast Construction Company—whereupon the original defendants in the action appealed to the Supreme Court of Missouri. The latter court affirmed the judgment, then granted a rehearing on the petition of the original defendants, and finally, after keeping the cause under advisement for more than two years after its resubmission, again affirmed the judgment of the trial court. Thereupon, the original defendants sued out a writ of error from this court.

The Charter of the City of St. Louis, which was in force at the time of the enactment of the ordinance for the construction of the district sewer in question (Woerner's Revised Code of St. Louis, page 410, Article VI, Section 21 of Charter), provided that district sewers should be established and constructed within the limits of districts to be prescribed by ordinance, and that, as soon as a district sewer was completed, the total cost thereof should be assessed "as a special tax against all the lots of ground in the district, respectively, without regard to improvements, and in the proportion that their respective areas bear to the area of the whole district, exclusive of the public highway", and that special tax bills should be issued accordingly for the assessment against the lots assessed.

In defense of this action the answer of the original defendants, now plaintiffs in error, pleaded, among other things, that the ordinances for the establishment of the sewer district in question and for the construction of the district sewer, as well as the tax bill in suit, deprived the plaintiffs in error of property without due process of law, and denied them the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States. The allegations of the answer in that respect will be more fully hereinafter set forth.

That defense was predicated on the omission of certain property held by the City of St. Louis and about to be referred to.

The City of St. Louis held a large tract of land, which was used as a park and called Tower Grove Park. The park proper was surrounded on all its sides by a strip of land two hundred feet in depth, which was reserved and held, under the conveyance of the entire property to the city, for residential purposes. The park property, and by that expression as hereinafter used, we shall mean both the park proper and the above-mentioned strip, had a frontage of 1,470 feet on the street called Kingshighway boulevard. This frontage constituted the western front of the park property, and it ran from Arsenal street (which is the southern boundary of the park property) northwardly along Kingshighway boulevard for the above-mentioned distance.

The main stem of the district sewer in question ran along the center of Kingshighway boulevard from Arsenal street to Bischoff avenue, the northern boundary of the land of the plaintiffs in error, where it emptied in the Joint District Sewer. The sewer district in question, namely, the Manchester Road Sewer District No. 3, a blue print of which is contained in the record, included all the land on the west line of Kingshighway boulevard between Arsenal street and Bischoff avenue; but on the east of the sewer, which

was the side on which the park property fronts, the district ran from Arsenal street, the southern boundary of the park property, to a point directly opposite the northern boundary line of the park property, and then it turned eastwardly and ran along the northern boundary line of the park property to a point slightly more than 600 feet east of the eastern line of Kingshighway boulevard, where it again turned northwardly.

There can, therefore, be no reasonable question of the intentional omission of the park property from the sewer district.

A jury was waived, and the trial court made a special finding of the facts, and of its conclusions of law. This was done upon the written request of the plaintiffs in error, and under the statute which provides (Revised Statutes of Missouri 1909, Volume I, Section 1972) as follows:

> "Trial of question of fact by Court—duty as to findings.—Upon the trial of a question of fact by the Court, it shall not be necessary for the Court to state its finding, except generally, unless one of the parties thereto request it with the view of excepting to the decision of the Court upon the questions of law or equity arising in the case, in which case the Court shall state in writing the conclusions of facts found separately from the conclusions of law."

The findings of facts and law, thus made by the trial court, in so far as the same appertain to the above-mentioned defense, are as follows (Printed Rec., pp. 77.):

"And the Court further finds that there is no evidence before it to justify the inference that the Municipal Assembly of the City of St. Louis, in passing the ordinances establishing the limits of said 'Manchester Road Sewer District No. 3' was actuated by motives of fraud or oppression, and that such improper motives, if any, can and must be inferred solely from the failure of said assembly to incorporate in such district any tracts or parcels of land the topography of which might render it necessary or expedient to then, or thereafter, drain the water or sewage therefrom into the particular sewer in question.

"And the Court further finds from the evidence that under a deed of conveyance, dated and acknowledged October 20th, 1868, and recorded in book 370, page 421, Henry Shaw conveyed to the City of St. Louis the entire tract now known as Tower Grove Park, located between Grand avenue on the east, Kingshighway on the west, Arsenal street on the south and Magnolia avenue on the north, but reserved therefrom, for his own use, a strip 200 feet wide, completely surrounding the tract to be used as a park (barring necessary openings or passageways through the same); said surrounding strip of 200 feet to be leased through the Commissioners of the park, in lots of not over 200, nor under 100 feet in width,

for periods of thirty years, respectively, and the net income to be derived from such leases to be turned over to said Shaw or his assigns. Said deed further providing that for any violation of or failure to perform the covenants and conditions thereby imposed upon the City of St. Louis, said Shaw, his heirs or assigns, might cause a forfeiture of the title so granted, and a reversion of the land conveyed to said Shaw or his appointee.

"And by a supplemental and corrective conveyance dated the 9th day of July, 1872, recorded in book 449, page 508, Recorder's office of the City of St. Louis, said Shaw did modify the conditions in said former deed contained as to forfeiture or reverter of title, but did not affect the rights to the said tract of land to be used as Tower Grove Park, nor of the strip, 200 feet in width, surrounding the same.

"And the Court further finds that the entire western front of the tract so conveyed by Shaw to the City of St. Louis by deed of October 20, 1868, including in such front both the western gate or entrance of Tower Grove Park and the strip 200 feet in width, surrounding the park proper, and embracing a total frontage along Kingshighway, from the north line of Arsenal street to the south line of Tower Grove Addition of about 1,470 feet abuts the east line of Kingshighway, in which street one of the lines of sewer constructed under the contract and ordinance in question is located; and that none of the property so included within Tower Grove Park, or the strip of 200 feet in depth, reserved by said

Shaw for residence property, is included within the taxing district for such sewer construction.*

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*In the findings of fact as originally made there is added here the following: "Nor is any property so included which abuts Arsenal street, and the sewer therein, for a distance of 1,000 feet, more or less, from the west line of Kingshighway, westwardly along said Arsenal street." This addition, however, was contrary to the fact, and was stricken out by the trial court when it overruled the motion for a new trial filed by the present plaintiffs in error (Printed Record, p. [illegible]).

"That with the exception of an area composing some 300 feet, each way, and located at the southwestern corner of Tower Grove Park, the western part of said park for a distance of some 600 feet east of Kingshighway is of an elevation higher than said Kingshighway between Arsenal street and Magnolia avenue, and the natural drainage thereof is in the main westwardly towards said Kingshighway, and the Court does further find that before the building of the sewer in question, surface water and hydrants drained from said part of the park, through drains and gutters, under said street and sidewalk, to a point west of Kingshighway; that whatever drains for surface and hydrant water now exist in said western and northwestern portion of said park lead into that section of the sewer in question, situated in Kingshighway adjoining said park, but the Court is unable to determine from the evidence as to when such connection with said sewer was accomplished, or by whom.

"I do also find that at the time the work in question was performed it was provided by the Revised Ordinances of the City of St. Louis that water draining from roofs of houses should not flow over sidewalks, but should be conducted through pipes to a sewer, if available, and if not, then such water should be conducted through pipes below the sidewalk, and into the open gutter of the street.

"And the Court does not find from the evidence that it is not possible or feasible to drain the surface water now falling upon or collected from that portion of Tower Grove Park, and the reserved strip of 200 feet, which is higher than and inclined towards Kingshighway, from the surface of said land in any other manner than through or by the district sewer constructed in Kingshighway, or that sewage from houses upon said reserved strip, if any there ever be, cannot be disposed of by means other than said sewer.

Conclusions of Law.

"Finding the facts as aforesaid, the Court concludes as a matter of law, that it was within the powers of the Municipal Assembly, in the passage of ordinances establishing the sewer district wherein the work sued for was performed, to embrace and designate therein only such real estate as, in its judgment, would be benefited thereby, and that the discretion vested in said Municipal Legislature is not subject to review by this Court, unless the powers of said Legislature were affirm-

atively shown to have been exercised fraudulently, oppressively or arbitrarily (Prior v. Construction Co., 170 Mo. 440; Herman v. Schulte, 166 Mo., *l. c.* 416; Herman v. Allen, 156 Mo., *l. c.* 550). And it is further concluded, as a matter of law, from the precedent facts, that the mere omission of lands from said district which might, at one time, be reasonably included in the sewer district in question, or as to which it is reasonable to assume that the same would more conveniently be served by the sewer in question than any other, does not justify the Court in concluding that the Municipal Assembly, in omitting said lands from the sewer district in question, was actuated by motives of fraud or oppression; or that the *prima facie* liability of defendants (Sec. 25, Art. VI, Charter of City) established by the certified special tax bill is thereby rebutted and overturned."

Another question in this cause arises out of the action of Division No. 2 of the Supreme Court of Missouri, which decided this cause, in failing to transfer the cause to the Court *en banc*. Under the Constitution of the State of Missouri, prior to the amendments to which we shall refer, the Supreme Court of Missouri had exclusive appellate jurisdiction of all causes wherein the amount in dispute, exclusive of cost, exceeded $2,500.00, and, furthermore, of all causes, regardless of the amount involved, which involved the construction of the Constitution of the United States or of the State (Constitution of Mis-

souri, Article VI, Section 12; published in Revised Statutes of Missouri, 1909, Volume 1, page 88).

Subsequently, by constitutional amendment adopted in 1884, authority was given to the General Assembly of the State to increase or decrease the pecuniary limit of this jurisdiction (Revised Statutes of Missouri, 1909, Volume 1, Page 100, Section 3), and under this provision the pecuniary limit was increased by statute to $7,500.00 (Revised Statutes of Missouri, 1909, Volume 1, Section 3937).

By an amendment to the Constitution of the State, adopted in 1890, the Supreme Court of the State was divided into two divisions—one known as Division No. 1, consisting of four judges, and the other known as Division No. 2, consisting of three judges; and this constitutional amendment contained the following further provision (Revised Statutes of Missouri, 1909, Volume 1, Page 103, Section 4):

> "Sec. 4. Case transferred to court *en banc*, when.—When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause, on the application of the losing party, shall be transferred to the court for its decision; or when a division in which a cause is pending shall so order, the cause shall be transferred to the court of its decision."

The present cause was heard before Division No. 2 of the court; and, after the final decision of this cause by that division, the present plaintiffs in error duly filed a motion for the transfer of the cause to the court *en banc*. That motion will be found at page 101 of the printed record. That motion was overruled (printed record, page 102); and the plaintiffs in error now urge that this ruling was arbitrary and contravened Section One of the Fourteenth Amendment of the Constitution of the United States, in that it deprived them of their property without due process of law, and denied them the equal protection of the laws, proper assignments of error to that effect having been duly made.

In order to show that a federal question was duly presented by the pleadings in this cause, more fully than we have already done, we will add that, after referring to the omission of the park property from the sewer district, the answer alleges that the park property derived and possessed all advantages of drainage and of sewer facilities which other land in the sewer district enjoys, and was benefited in like manner as such other property, and that of right the park property should have been included in the sewer district and borne its proper share of the cost of the sewer; and that the answer then proceeds as follows (printed record, pp. 14-15):

"12. And the defendants further state that the aforesaid tract of land held and owned by said City was not, nor was any part thereof, included or embraced in the aforesaid alleged sewer district, and that said City, and its representatives and officers, omitted to include the said tract of land in said alleged sewer district in order that, and with the intent that, the said tract of land should not, and that none thereof should be assessed or charged with any part of the cost of the aforesaid sewers constructed as aforesaid, and that said City should not be required to pay, and should not pay, any part of the cost of said sewers; that in point of fact said tract of land was not, nor was any part thereof, assessed or charged with, and said City was not compelled to pay, and has not paid on account thereof, any part of the cost of said sewers, but that the whole of said cost was assessed against lands contained in said alleged sewer district.

"13. And the defendants further state that all the aforesaid proceedings, matters and things, and especially the aforesaid alleged ordinances and the aforesaid assessment of the cost of the aforesaid sewers, and the aforesaid special tax bill, were in intentional disregard of the duties of said city towards, and of the rights of, the owners of the various tracts and lots of land embraced in said alleged sewer district, and of these defendants among others; that the same were oppressive and arbitrary and discriminated unjustly and unfairly and willfully against all the said owners, including these defendants, and the

aforesaid lots or tracts of land, including the land of these defendants, and in favor of the said city and of said tract of land held and owned by it as aforesaid; and that the same were contrary to law; and that by the said proceedings, matters and things, and especially said alleged ordinances, said assessment of the cost of said sewers, and said alleged special tax bill, the defendants were denied the equal protection of the laws contrary to the provisions of the Constitution of the United States, to wit, the Fourteenth Amendment of said Constitution, and were deprived of property without due process of law contrary to the provisions of said Constitution, to wit, of said Fourteenth Amendment thereof, and also contrary to the Constitution of this State.

"Wherefore, having fully answered, these defendants pray to be discharged with judgment for their costs."

ASSIGNMENT OF ERRORS.

I.

The failure of the municipal authorities of the City of St. Louis to include any part of the Tower Grove Park property in the sewer district in question was arbitrary, and violated the Fourteenth Amendment to the Constitution of the United States, in that it deprived the plaintiffs in error of property without due process of law, and, further, in that it denied to the plaintiffs in error the equal protection of the laws.

II.

The facts found by the trial court are sufficient to establish that such omission was arbitrary.

III.

The facts found by the trial court were not sufficient to warrant its judgment. Nor can the findings of fact made by that Court be aided by additional findings.

IV.

The conclusions of law upon which the trial court based its judgment were erroneous, and are ground for a reversal of that judgment.

V.

Inasmuch as a federal question is clearly involved in this cause, the refusal of Division No. 2 of the Supreme Court of Missouri to transfer this cause to the court *en banc* was arbitrary, and violated the Fourteenth Amendment to the Constitution of the United States, in that the plaintiffs in error were thereby deprived of property without due process of law, and, furthermore, denied the equal protection of the laws.

VI.

If no Federal question were involved in this cause, the judgment of said Division No. 2 would be without jurisdiction, and, therefore, in violation of said Fourteenth Amendment, since, in that case, also, the plaintiffs in error would be deprived of property without due process of law by that judgment.

POINTS.

I.

The failure of the municipal authorities of the City of St. Louis to include any part of the Tower Grove Park property in the sewer district in question, if arbitrary, violated Section 1 of the Fourteenth Amendment to the Constitution of the United States:

Masters v. City of Portland, 24 Oregon 161;
Hanscom v. City of Omaha, 11 Neb. 37, *l. c.* 43, 44;
Frasey v. Mulaney, 129 Wis. 377, *l. c.* 385;
Lawrence v. City of Grand Rapids, 166 Mich. 134;
Title Guarantee and Trust Company v. Chicago, 162 Ill. 505, *l. c.* 509;
Vandeventer v. Long Island City, 139 N. Y. 133, *l. c.* 139;
City of Tulsa v. McCormick, 164 Pa. Rep 985;
Whitley v. Fawcett, Styles Rep., p. 13.

II.

The facts found by the trial court are sufficient to establish that such omission was arbitrary.

Lawrence v. City of Grand Rapids, 166 Mich. 134, *l. c.* 144;
Mt. St. Mary's Cemetery v. Mullins, 248 U. S. 498, *l. c.* 505.

III.

The findings of fact made by the trial court are conclusive; nor can they be aided by additional findings. If they are insufficient to support the judgment of the trial court, that judgment should be reversed.

Downing v. Bourlier, 21 Mo. 149, *l. c.* 150, 151;
Allison v. Darton, 24 Mo. 343, *l. c.* 346;
Abeles v. Pillman, 261 Mo. 359, *l. c.* 376;
Sun Mutual Insurance Co. v. Ocean Insurance Co., 107 U. S. 485, *l. c.* 500;
Farleigh v. Cadman, 159 N. Y. 169, *l. c.* 175;
Cyclopedia of Law & Procedure, Vol. XXXVIII, pp. 1954, 1964, 1968.

IV.

The conclusions of law upon which the trial court based its judgment were erroneous, and are ground for the reversal of that judgment.

1. Because the omission of the park property from the sewer district warranted a finding of fact that the members of the Municipal Assembly were actuated by motives which constitute legal fraud; and

2. Because the motives of the Municipal Assembly were immaterial.

Soon Hing v. Crowley, 113 U. S. 703, *l. c.* 710;
Brown v. The City of Cape Girardeau, 90 Mo. 377, *l. c.* 383;
Kansas City v. Hyde, 196 Mo. 498, *l. c.* 507;
Kerfoot v. Chicago, 195 Ill. 229, *l. c.* 232;
Potter v. McDowell, 31 Mo. 62, *l. c.* 69.

V.

The refusal of Division No. 2 of the Supreme Court of Missouri to transfer this cause to the court *en banc* was arbitrary, and violated Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Amendment to the Constitution of Missouri, adopted in 1890, Section 4;
Moore v. State of Missouri, 159 U. S. 673.

The action of said Division No. 2 was the action of the State, within the purview of the Federal Constitution, and, if arbitrary, violated said Section 1 of said Fourteenth Amendment.

Ex parte Virginia, 100 U. S. 339;
Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278, *l. c.* 289;
Hovey v. Elliott, 167 U. S. 409, *l. c.* 417, 418;
Ex parte Nelson, 251 Mo., 63, *l. c.* 104.

Moreover, if no federal question had been involved, the Supreme Court of Missouri would have had no jurisdiction of this case.

Barber Asphalt Paving Co. v. Hezel, 138 Mo. 228, *l. c.* 233;
Smith v. City of Westport, 174 Mo. 394;
Platt v. Parker-Washington Co., 235 Mo. 467.

And if the judgment of the Supreme Court was rendered without jurisdiction, then that, in itself, constituted a taking of property without due process of law.

Scott v. McNeal, 154 U. S. 34, *l. c.* 45, 46;
Pennoyer v. Neff, 95 U. S. 714, *l. c.* 733;
Lent v. Tillson, 140 U. S. 316, *l. c.* 331;
Old Wayne Life Association v. McDonough, 204 U. S. 8, *l. c.* 15.

ARGUMENT.

I.

The exclusion of the entire park property from the sewer district, if it was arbitrary, violated the Fourteenth Amendment to the Constitution of the United States, and entitles the plaintiffs in error to a reversal of the judgment of the trial court.

Ordinarily, in cases of this character, the claim is made that the property sought to be charged with a part of the cost of a local improvement was not in reality benefited. The mere existence of benefit, however, does not determine the proper apportionment of that cost. All property subjected to taxation must be taxed proportionately, and one person may not be taxed, when others similarly situated are not taxed. Moreover, when any property benefited by a local improvement is not included in an assessment, the necessary result is to subject other property to a greater assessment than should have been made.

The foregoing principles seem to us to be elementary, and we forbear from the further discussion of them. We limit ourselves simply to a reference to the authorities, which relate to local improvements and apply the foregoing principles to cases of that character.

In **Masters v. City of Portland**, 24 Oregon 161, where the very question was involved, the Court held:

> "A willful, arbitrary and intentional omission on the part of a city council to assess a portion of the property benefited by a local improvement, placing the whole burden upon the remaining property, renders the assessment void, even though the direct benefits to the separate parcels are in excess of the assessment thereon."

The same ruling was also made in **Hanscom v. City of Omaha**, 11 Neb. 37, *l. c.* 43, 44, where the Court said:

> "But it is said that the mayor and council had authority to form suitable districts, and that, having formed the same, their judgment cannot be reviewed in this action. • • • Therefore, when the mayor and council formed a sewerage district by arbitrary lines, and without regard to the topography or drainage of the city, and made such sewer district a taxing district upon which special assessments might be levied for the construction of sewers in any part of the district without regard to the special benefits to property, they exceeded their authority and their action therein is a nullity."

So it is said in **Fraser v. Mulaney**, 129 Wis. 377, *l. c.* 385, a recent case:

"No statutory duty is more imperative than that they (the supervisors of the town) shall honestly exercise the judgment and discretion thus conferred upon them. From the very fact of the granting of such discretion results the opportunity to abuse it. Such an opportunity cannot be used to willfully and dishonestly, through favoritism or animosity, assess or exempt property, and if it is possible to prove that their final determination was the result of a failure or refusal to exercise judgment, and was reached arbitrarily or fraudulently, then such a departure from their statutory duty is disclosed as must avoid their action."

And so in **Lawrence v. City of Grand Rapids**, 166 Mich. 134, another recent cae, it was held (*syllabus* 2 of case):

"In a suit to invalidate the creation of a special assessment district by the council of a city, and to enjoin the collection of a special assessment, evidence **held** to justify a finding that the boundaries of the district were fixed without reference either to known or ascertainable facts, and that the action of the council was arbitrary and unwarranted, justifying relief."

In that case the Supreme Court of Michigan said:

"It is the general rule that when a common council has in good faith with reference to ascertainable facts, defined such a special assessment district, its conclusion in the premises is final.

> "It is claimed in this case that the council did not act with reference to the known or ascertainable facts, but in a wholly arbitrary manner, in fixing the boundaries of the particular assessment district. This brings us to an examination of what the record discloses upon this branch of the case. * * * From this and other testimony we feel obliged to agree with the trial judge in the conclusion, that the boundaries of the district were fixed by the common council without reference either to known or ascertainable facts; that the action was arbitrary and unwarranted. We are of the opinion, also, that the bill of complaint, fairly interpreted, charges the creation of a district invalid because not including lands benefited by the improvement."

Similar in effect is the following declaration of the Supreme Court of Illinois in **Title Guarantee and Trust Company v. Chicago,** 162 Ill. 505, *l. c.* 509:

> "By these provisions power to legislate for the construction of sewers is conferred; but the nature of the legislation is left to be determined by the city. The grant of power is general in its nature, and its exercise may be either reasonable, or arbitrary, unreasonable and oppressive. In such cases the legislative grant is subject to the **implied limitation,** that its exercise shall be reasonable, and the courts have the power to pass upon and determine that question as one of law."

And says the Court in **Vandeventer v. Long Island City,** 139 N. Y. 133, *l. c.* 139:

> "Under the authorities cited, if a single lot be omitted from assessment through ignorance or mistake, the mere fact of the omission renders the assessment illegal and void."

The third syllabus to **City of Tulsa v. McCormick,** 164 Pac. Rep. 985 (which does not appear to be officially reported as yet), reads as follows:

> "An ordinance levying assessments to pay for the cost of constructing certain paving on the streets of the City of Tulsa, which creates arbitrary differences in the property to be assessed without regard to the benefits received, and which permits certain property benefited to wholly escape assessments, violates Section 7, Article 2, Williams Ann. Const., and the Fourteenth Amendment to the Constitution of the United States."

In concluding these authorities we wish to refer to **Whitley v. Fawcett,** Styles Rep., p. 13, decided in 1649. We quote the following from the report of that case:

> "4th. It appears there are 800 acres of land which are in the hands of the King, which are not taxed as by the law they ought; and so the tax is unjust, because by the not taxing of them a greater burden was laid upon the rest of the land than of right ought to be; and this the Court held a good exception and said that the King's lands are taxable by statute."

Surely it would be a sad commentary upon our much vaunted political independence, and upon our boasts of the protection of the individual against arbitary action on the part of the state, if the courts of this day should hesitate to carry into effect rights recognized and enforced by the English courts more than two hundred and fifty years ago, and prior to the bill of rights.

There is all the more reason for this remark, because, in the present case, the dereliction of the municipal authorities was for the direct pecuniary advantage of the city, and because the land of the city was, moreover, benefited by the district sewer in question to a greater extent than other vacant land which was included in the taxing district.

In no other case, which has come to our notice, was there an exclusion from the taxing district of land belonging to the taxing power, or an advantage to the taxing power from its abuse of its discretion. The present case is much akin in principle to the violation by a trustee of his duties for the purpose of pecuniary benefit to himself.

II.

The facts found by the trial court are sufficient to establish that the omission of park property was arbitary.

As appears from our foregoing statement, the trial court found:

1. "That with the exception of an area comprising some 200 feet, each way, and located at the southwestern corner of Tower Grove Park, the western part of said park for a distance of some 600 feet east of Kingshighway is of an elevation higher than said Kingshighway between Arsenal street and Magnolia avenue, and the natural drainage thereof is in the main westwardly towards said Kingshighway."

2. "That, before the building of the sewer in question, surface water and hydrants drained from said part of the park through drains and gutters, under said street and sidewalk, to a point west of Kingshighway."

3. "That whatever drains for surface and hydrant water now exist in said western and northwestern portions of said park, lead into that section of the sewer in question, situated in Kingshighway adjoining said park."

And the Court further found that the strip, 200 feet long, which was reserved for residence purposes, completely surrounded the park proper (leaving necessary openings or passage-ways). It follows that the strip so reserved extended along the entire front of the park property from its northern to its southern end, and the conveyance of the park property to the city, the plat herein mentioned and the filing thereof in accordance, all done prior to the time

Now, what further benefit could accrue from a sewer to any property, not improved with buildings, than the park property, and especially the part reserved for residence purposes, thus enjoyed?

The only advantages, which accrue to property from the construction of sewers, is the opportunity for the drainage of sewage and the drainage of surface waters. Of these, the drainage of surface waters necessitates by far the dimensions of the sewer; the surface water being much greater in volume than the amount of the sewage.

Nor is it necessary to constitute a benefit with respect to the drainage of sewage, that the property should be improved so as to give occasion for the drainage of sewage at the time. It is sufficient with respect to vacant property, that the opportunity is afforded for the drainage of sewage whenever the property is improved. If this were not so, vacant property could not be charged with any part of the cost of a local assessment, when the natural drainage is not toward the sewer.

In **Lawrence v. City of Grand Rapids**, 166 Mich. 134, *l. c.* 144, it is said:

> "Some things in connection therewith, however, appear to us to be reasonably clear. The benefit accruing to an owner of property when a sewer is constructed in the street upon which the property abuts does not necessarily depend upon the use to which the property is devoted. An owner of va-

> cant property abutting upon a sewer is benefited by the construction of the sewer and perhaps quite as much so as if there were standing upon his land an apartment house housing a large number of people, since with the sewer once laid his property may be devoted to the housing of any number of people which it will contain."

In other words, it is the potential advantage or benefit to the vacant land which warrants assessment of it.

Moreover, we summit that, in **Mt. St. Mary's Cemetery v. Mullins**, 248 U. S. 498, *l. c.* 505, this Court has virtually held that the drainage of surface waters justified the assessment of vacant land for the construction of a sewer. This Court there said:

> "It is urged that the Cemetery Association was not benefited by the assessment. But the Court found, with evidence to support its conclusion, that the sewers served to carry away surface water; and that there was no evidence to show that the cemetery would not have been benefited as to sanitation as a result of the construction of the sewers."

And this view also finds support in **Lawrence v. City of Grand Rapids**, *supra.*

In its opinion in this cause, which is to be found in the record and which is also reported in 273 Mo. 184,

the Supreme Court of Missouri said in this connection (273 Mo., *l. c.* 197):

> "The city, in laying out the sewer district, had a right to consider the fact that nearly half the park front drained south and not into Kingshighway, and that the other half was park grounds which absorb a large portion of the rainfall, unlike roofs and pavements which discharge all the water into the sewer. It had the right to consider that the park as the dominant tract was under no legal obligation to dispose of its surface water flowing therefrom in its natural direction. These facts were not such as to necessarily control the city in its action, but they were entitled to consideration."

But if this were so, and it were all of the matter, it would not defeat the contention of the plaintiffs in error herein. All of the considerations which are mentioned by the Supreme Court apply to vacant land in general; and, therefore, if they were ground for the exemption of the park property from taxation, they would at least equally be ground for the exemption of other vacant land. Especially would this be so with regard to the land of the plaintiffs in error, which not only is vacant but also does not derive from the sewer in question the advantage of the drainage of surface waters, which the park property possesses; for the undisputed testimony of Mr. Jolly, who is connected with the Street Department of the City of St. Louis

as engineer of grades and surveys, shows that the land of the plaintiffs in error drains not toward the sewer in question but away from it. That testimony is as follows (Printed Record, page 47):

> "Q. Take the grade of Old Manchester road, which is the southern line of the defendants' property, isn't that grade higher than the grade at Bischoff avenue, which is the northern line of defendants' property?
>
> A. The established grade—the grade is higher here at Old Manchester than at Bischoff.
>
> Q. The defendants' property also slopes towards the north, that is the elevation on the northern side is less than the elevation on the southern side?
>
> A. Yes, sir.
>
> Q. Or, to put it otherwise, the elevation on Bischoff avenue is considerably less than the elevation at Old Manchester road?
>
> A. Yes, sir; about six feet.
>
> Q. There is six feet difference in elevation between those two points?
>
> A. In the natural grade, yes, sir; I don't know about the established grade."

Moreover, the statement of the Supreme Court of Missouri, that nearly one-half of the park front drains south and not into Kingshighway, is contrary to the express finding of the trial court, which, as will later appear herein, is controlling. But whether all of the park property, with the exception of the south-

ern 300 feet, drains naturally towards Kingshighway, as the trial court found, or whether all of that property, with the exception of 600 feet, as the Supreme Court of Missouri asserts, drained naturally into Kingshighway, does not seem to us to be material. It merely relates to the extent to which the park property was benefited through the discharge of surface waters, and, at most, to the quantity of land which should have been included in the local assessment.

Nor do we understand on what grounds the Supreme Court of Missouri bases its declaration that the northern part of the park grounds absorbs a large portion of the rainfall. There is nothing in the findings of the trial court, nor is there anything in the evidence, which warrants that statement. On the contrary, the opinion of the Supreme Court of Missouri concedes, and the evidence shows without dispute, that there is a fall of eighteen feet in the western six hundred feet of the park—Kingshighway being at least eighteen feet lower than the park property six hundred feet to the east. It would seem to us that the natural drainage of surface waters from property so situated must be considerable. Besides the testimony of all the witnesses who testified on the subject, and they are four in number, including Mr. Jolly, shows that there are driveways both in the northern and southern part of the park, which lead to the western entrance in the center of the park, and that along these driveways

there are gutters which collect the surface waters; and the finding of the trial court, as well as the undisputed evidence, is to the effect that all the waters thus gathered were led into inlets which formerly crossed Kingshighway, but are now connected with the sewer in question.

All these matters are overlooked by the Supreme Court of Missouri, as is also the fact that the strip of 200 feet reserved for residence purposes extended from the northern to the southern boundary of the park along Kingshighway, with the exception only of a small part used for the western entrance to the park.

In addition, we would urge that the remarks of the Supreme Court of Missouri, to which we have referred, are not consistent with the holding of this court in **Mt. St. Mary's Cemetery v. Mullins,** 248 U. S. 498, *l. c.* 505. If the drainage of surface waters from a cemetery, which is not shown to have any unusual grade, warrants the taxation of the cemetery for the construction of an adjacent sewer, then surely the drainage of surface waters from the park property, under the conditions as to grades, driveways and gutters and hydrants, and actual connection with the sewer, also furnishes ground for the assessment of the park property.

In the foregoing we have in some instances referred to the evidence. We do not mean thereby to take the

position that either the Supreme Court of Missouri or this court should review the findings of fact of the trial court or make additional findings. Our position in that regard is that the findings of fact of the trial court are controlling, and that there can be none other. We have referred to the evidence only because the Supreme Court of Missouri has gone outside of the findings of the trial court; and our only purpose is to show what the evidence is, if it is to be considered.

III.

The findings of fact made by the trial court are conclusive; nor can they be aided by additional findings. If they are insufficient to support the judgment of the trial court, that judgment should be reversed.

In connection with the foregoing, we submit the following authorities in support of our position as to the requisite nature of the findings of fact of the trial court, and their effect on appellate proceedings.

In **Downing v. Bourlier**, 21 Mo. 149, *l. c.* 150, 151, the Court said:

> "This finding does not touch the issue on the note and bill of exchange. It is not sufficient to support the judgment given by the court below. On the record in this case, material matters were put in issue, which, if found, might have entitled the defendant to the judgment. It was the duty of the Court to pass upon these matters, and find them in some way, either for or against the de-

fendant; it will not do to pass them over in silence."

In **Allison v. Darton**, 24 Mo. 343, *l. c.* 346, the Court said:

> "Where there is not a sufficient finding of facts to authorize the judgment, this court will reverse. The facts put in issue should be found—not the evidence nor conclusions of law."*

And in the more recent case of **Abeles v. Pillman**, 261 Mo. 359, *l. c.* 376, the Court said:

> "This being an action at law, it was the peculiar function of the jury, or the trial court sitting as a jury, to find the facts. 'It was the province of the trial court sitting as a jury to weigh the evidence and determine the real facts of the matter. This duty this court cannot usurp.' * * *
>
> "The Court made no finding of facts upon the theory now advanced by respondent. Appellant is entitled to have these issues of fact passed upon and determined by the trial court, and hence the case must necessarily be reversed and remanded for new trial."

Similarly, this Court has said in **Sun Mutual Insurance Co. v. Ocean Insurance Co.**, 107 U. S. 485, *l. c.* 500, with reference to a like practice in the Federal Courts:

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*The above ruling in Allison v. Darton was made under a former statute. The present statute (see *ante*, p. 5) expressly requires the court to state its conclusions of law.

> "The question, and the only question, which we can consider is, whether the facts found support the conclusions of law and the decree. The findings of fact being in the nature of a special verdict we can go neither behind nor beyond them. We cannot correct them by inquiring into the evidence, nor supply any omissions by intendment or inference."

The Court of Appeals of New York has said in **Farleigh v. Cadman,** 159 N. Y. 169, *l. c.* 175:

> "All this Court has the power to do is to take the findings of fact as they are, and draw from them the proper legal conclusions. * * * This Court may affirm, reverse or modify a judgment brought here for review 'or grant to either party such judgment as such party may be entitled to' (Code, Sec. 1377). This means, of course, such judgment as a party may be entitled to upon the facts found since we cannot review the facts or even look into the record to see whether they are supported by evidence, or whether some other facts should be supplied."

Without pursuing the authorities further, we may refer to a standard authority, Volume 38, Cyclopedia of Law and Procedure, subject "Trial", for the purpose of showing that the practice in this respect is general, and, we believe, without exception. In that work (Vol. 38, page 1954) it is said:

"It is a common provision in the code and practice acts of the various states that, upon the trial of a case by the court without a jury, the Court shall, as a basis of its judgment, state findings of fact and conclusions of law separately and in writing, and a failure to state such findings and conclusions is ground for reversal, provided, in several jurisdictions, that proper requests to find be made by one of the parties, and that exceptions be taken to the failure to find."

And at page 1964 it is stated:

"Not only must findings of fact and conclusions of law be followed by judgment in order to be of any conclusive effect, or to be reviewable, but they must be sufficient to sustain the judgment, and this is the test commonly resorted to in determining their sufficiency."

And at page 1968, it is stated:

"It is essential to the sufficiency of findings of fact that they be responsive to and cover all the material issues of the case, or at least sufficient of the issues raised by the pleadings to sustain the judgment."

IV.

The conclusions of law, upon which the trial court based its judgment, were erroneous and are ground for a reversal of that judgment. Nor do the facts found warrant that judgment.

As appears from our foregoing statement, the only conclusions of law announced by the trial court were, first, that the action of the Municipal Assembly in establishing the sewer district was conclusive, "unless the powers of said legislature were affirmatively shown to have been exercised fraudulently, oppressively or arbitrarily", and, secondly, "that the mere omission of lands from said district, which might, at one time, be reasonably included in the sewer district in question, or as to which it is reasonable to assume that the same would more conveniently be served by the sewer in question than any other, does not justify the Court in concluding that the Municipal Assembly, in omitting said lands from the sewer district in question, was actuated by motives of fraud or oppression; or that the *prima facie* liability of defendants established by the certified special tax bill is thereby rebutted or overturned".

In a previous portion of its findings, which is likewise quoted in our foregoing statement, the Court had stated that there was no evidence before it to justify the inference that the Municipal Assembly was actuated by motives of fraud or oppression, "and that such improper motives, if any, can and must be inferred solely from the failure of said assembly to incorporate in such district any tracts or parcels of land the topography of which might render it necessary or expedient to then, or thereafter, drain the water or

sewage therefrom into the particular sewer in question."

We maintain that this declaration of law and this declaration of the insufficiency of the evidence, are erroneous for two reasons, namely:

Firstly, because the omission of the park property from the sewer district did warrant a finding that the Municipal Assembly was actuated by motives which constitute legal fraud or oppression; and

Secondly, because the Court treated the existence of such motives as necessary to a conclusion that the powers of the legislature had been exercised fraudulently, oppressively or arbitrarily.

With due respect we submit that it was the duty of the City of St. Louis to exercise fairly and impartially its discretion in the designation of the district to be taxed for the sewer, and that, when it omitted lands which it had owned and managed for about forty years, and which derived the benefits, actual and potential, from the sewer which the Court finds to have been derived, the Court had at least the right to find that the action of the Municipal Assembly was in willful violation of its duties, to the advantage of the city, and the detriment of the landowners who were interested, that this action was fraudulent as a matter of law, and that the motives of the Assembly corresponded therewith. If this was so, it was erroneous to declare, as matter of law, that such motives could not be imputed.

it is sufficient if the fraud charged is of that character that has been defined to be the willful doing of an unlawful act. * * * And if the council should undertake to use the power that has been entrusted to it for the public benefit, to serve private interest, it is an abuse of the power, a violation of the trust, a willful doing of an unlawful act, a legal fraud" (**Kansas City v. Hyde**, 196 Mo., 498, *l. c.* 507).

"The Court, on its own motion, called as a witness a member of the board of local improvements and examined him, * * * and his testimony showed that there was no ulterior or improper motive on the part of the board. * * * This evidence was incompetent. * * * The absence of improper motive would not justify the violation of the statute" (**Kerfoot v. Chicago**, 195 Ill., 229, *l. c.* 232).

"It being well settled that the Courts may decide upon the reasonableness of ordinances, they will, in general, judge of these, whatever their purpose, by considering their nature and effect, rather than by instituting an inquiry into the motives of the members of the council" (Dillon on Municipal Corporations, 5th Ed., Vol. II, p. 914, note 3).

The Supreme Court of Missouri, in its opinion, states "that the finding of the Court on the question of motives was in direct response to defendants' answer."

We respectfully submit that this statement is with-

out foundation. Nowhere in the answer of the defendants, now plaintiffs in error, is any reference whatsoever made to the **motives** of members of the Municipal Assembly, or of anyone. The answer does charge, among other things, that the City of St. Louis, its representatives and officers, omitted the park property from the sewer district with the **intent** that it should not be taxed. But "intent" and "motives" are not synonymous.

The distinction between fraudulent intent and fraudulent motives is made most generally in the discussion of fraudulent conveyances. In a case of that character, **Potter v. McDowell**, 31 Mo. 62, *l. c.* 69, the Supreme Court said:

> "The law does not concern itself about the private or secret motives which may influence the debtor. It does not deal with his conscience. He may make the deed with the most upright intentions, really believing that he has a right to do so, and that it was his right and duty to do it; and yet, if the deed is voluntary and hinders and delays his creditors, it is fraudulent. The law presumes that every man intends the necessary consequences of his acts; and if the act does hinder and delay his creditors, then the law presumes it was made with a fraudulent intent, however pure in reality the motives of the debtor may have been."

An intentional omission of the park property was tantamount to an intent not to tax that property; and surely the trial court did not mean to say, as a matter of law, that the facts found by it did not warrant an inference that the park property was intentionally omitted?

V.

The refusal of Division No. 2 of the Supreme Court of Missouri to transfer this cause to the court en banc was arbitrary and violated the Fourteenth Amendment to the Constitution of the United States, in that a Federal question is clearly involved; and if no Federal question were involved, the judgment of that court would be without jurisdiction, and, therefore, contrary to said Fourteenth Amendment.

Section 4 of the Amendment of 1890 to the Constitution of Missouri, which is set forth at page 11 of our foregoing statement, explicitly requires either division of the Supreme Court of the State to transfer a cause decided by it to the court *en banc* upou application of the losing party, if a Federal question is involved in the cause; and we think that there can be no question that such a question was involved.

This provision is not subject to the slightest ambiguity or uncertainty. There is, however, no way to enforce it other than by writ of error from this court;

for the Supreme Court of Missouri *en banc* has ruled that the refusal of a Division to transfer a cause is final, and that the court *en banc* cannot compel the transfer. This was held in **State v. Duestrow**, 137 Mo., 44, *l. c.* 91 to 96, and has ever since that decision been the rule. The conclusion of the Court, two Judges dissenting, is expressed as follows (137 Mo., *l. c.* 96):

> "In this case division two heard the appeal on its merits. The application to transfer was properly made to it. The right to a transfer depended upon whether a Federal question was involved. That was a question for that division to settle. It did so by finding that no Federal question was involved, or, as the application was denied, we must presume it so found. The Court sitting *in banc* is given no power to review that decision."

There would seem to be no room, on principle, to question the right of resort to this court, when a plain constitutional right of this character is denied. The judiciary is an instrumentality of the state, just as the executive department and the legislature is. Its action is the action of the State; and the constitutional prohibition against the taking of property without the due process of law, and the constitutional guarantee of the equal protection of the laws, extend to the judicial action of the State, as well as to the legislative. This is settled by decisions of this court in quite a number of cases, including:

Ex parte Virginia, 100 U. S. 339;
Home Telephone and Telegraph Co. v. Los Angeles, 227 U. S. 278, *l. c.* 289;
Hovey v. Elliott, 167 U. S., 409, *l. c.* 417-418.

Among the rights thus protected is the right of recourse to the courts afforded by the law. Nor does it matter whether a hearing is wrongfully denied by a trial court or an appellate court. There is no difference in principle; and the effect is the same. No where is this more succinctly expressed than in an opinion by the Court of whose action we are now complaining. Said the Court in **Ex parte Nelson**, 251 Mo., 63, *l. c.* 104:

> "The authorities are uniform in holding that these constitutional provisions are applicable to every form of procedure where the life, liberty or property of a person is sought to be taken from him, whether it be by the trial or appellate court."

The matter under discussion was before this court in **Moore v. State of Missouri**, 159 U. S. 673. In that cause the plaintiff in error urged that he "was denied due process of law, because his case was not heard by the court *in banc*, consisting of seven judges, but was left on the disposition of it by Division No. 2, consisting of three judges". The ruling of this court is thus expressed in the *syllabus* to that case:

"No question which could be regarded as a Federal question having been raised at his trial, the prisoner was not subjected to an unconstitutional ruling in not being allowed to have his case heard at large by seven judges, instead of by three."

It seems to us, however, that the fact that this court entertained the assignment of error in question is indicative of a disposition to sustain it in a proper case.

In the present case, there does not seem to us to be any reasonable ground for denying that a Federal question was involved. The answer of the plaintiffs in error clearly raised a question of that character.

However, if no Federal question was involved, then no constitutional question was involved. And if no constitutional question was involved, then the Supreme Court was without jurisdiction of the cause on appeal; for the appeal was not within the pecuniary limit of the appellate jurisdiction of that court, and the only ground upon which that jurisdiction could be maintained is the ground, that a constitutional question was involved. The Supreme Court of Missouri has definitely decided that it has no jurisdiction of an appeal merely because the suit is on a special tax bill.

Barber Asphalt Paving Co. v. Hezel, 138 Mo. 228, *l. c.* 233;
Smith v. City of Westport, 174 Mo. 394;
Platt v. Parker-Washington Co., 235 Mo. 467.

And if the judgment of the Supreme Court was rendered without jurisdiction, then that, in itself, constituted a taking of property without due process of law.

Scott v. McNeal, 154 U. S. 34, *l. c.* 45, 46;
Pennoyer v. Neff, 95 U. S. 714, *l. c.* 733;
Lent v. Tillson, 140 U. S. 316, *l. c.* 331;
Old Wayne Life Association v. McDonough, 204 U. S. 8, *l. c.* 15.

We respectfully submit that by assuming jurisdiction, Division No. 2 of the Supreme Court of Missouri held, in effect, that a constitutional, and therefore a Federal question, was involved; and yet it refused to make the transfer of the cause to the Court *en banc*, which it was its duty, under the Constitution of the State, to make, if that question existed.

Respectfully submitted,

DAVID GOLDSMITH,
Attorney for Plaintiffs in Error.

Supreme Court, U. S.
FILED
DEC 17 1919
JAMES D. MAHER,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

DAVID GOLDSMITH, REBECCA LOTH, ESTHER I. GOLDSMITH, AMELIA GOLDSMITH and ROSE GOLDSMITH,
Plaintiffs-in-Error,
v.
THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY,
Defendant-in-Error.
No. 127.

BRIEF FOR DEFENDANT-IN-ERROR.

HICKMAN P. RODGERS,
Attorney for Defendant-in-Error.

A. R. & HOWARD TAYLOR,
Of Counsel.

Real Estate Pig. & Pub. Co., St. Louis, Mo. Roll, Olive 1093.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

DAVID GOLDSMITH, REBECCA LOTH, ESTHER I. GOLDSMITH, AMELIA GOLDSMITH and ROSE GOLDSMITH,
Plaintiffs-in-Error,
v.
THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY,
Defendant-in-Error.
No. 127.

BRIEF FOR DEFENDANT-IN-ERROR.

HICKMAN P. RODGERS,
Attorney for Defendant-in-Error.

A. R. & HOWARD TAYLOR,
Of Counsel.

Real Estate Pig. & Pub. Co., St. Louis, Mo. Roll, Olive 1698.

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BRIEF FOR DEFENDANT-IN-ERROR.

STATEMENT.

The defendant-in-error was a contractor in the City of St. Louis, and under contract with said City constructed the district sewer provided for in Manchester Road Sewer District No. 3 (a blue print of same is said to be contained in the printed record before this Court, a copy of which is unobtainable by counsel for defendant-in-error at this time, as same, from our information, has not as yet been prepared by plaintiffs-in-error, and all defendant-in-error's counsel has be-

fore him is a galley copy of contemplated brief with references to blank pages of the printed record.)

After completion of said sewer by defendant-in-error and after the issuance of special tax bills by said City to provide for payment for said work of so constructing said district sewer by defendant-in-error, and after refusal by plaintiffs-in-error to pay their proportion of said work as designated by said City this action was brought in the Circuit Court of said City of St. Louis for the enforcement of payment by said plaintiffs-in-error of a special tax bill for their proportion of the work of constructing said district sewer in said Manchester Road Sewer District No. 3.

The Circuit Court of the City of St. Louis, Judge Hugo Muench, presiding, and sitting as a jury, a jury trial having been waived by stipulation, rendered judgment in favor of The George G. Prendergast Construction Company, defendant-in-error, but the plaintiff in the Circuit Court.

The case was appealed to the Supreme Court of Missouri by the plaintiffs-in-error, and there judgment in favor of plaintiff was affirmed, and after the granting of a rehearing in the Supreme Court, said Court again affirmed the original judgment, whereupon defendants sued out a writ of error from this Court.

The defense in this case claimed at the trial in the Circuit Court that the Municipal Assembly of the City of St. Louis, in passing the ordinances establishing the limits of said Manchester Road Sewer District No. 3, was actuated by motives of fraud or oppression, and therefore, as alleged in defendant's answer, that the ordinances for the establishment of the sewer district in question and for the construction of the district sewer as well as the tax bill in suit, deprived the de-

fendants of property without due process of law and denied them the equal protection of the laws contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

The defendants based their claim that the Municipal Assembly was guilty of fraud and oppression, on the fact that in determining the sewer district in question it had not included in the district Tower Grove Park, a city park, lying outside of the established district to the Southeast.

There was no contention on the part of the defendants in the Circuit Court that the ordinances establishing the sewer district had not been properly passed by the Municipal Assembly of the City of St. Louis, as provided for in the city charter, or that any other irregularity existed in the passing of the ordinances establishing the sewer district in question, or in the issuance of the special tax bill sued on by plaintiffs, except and only that because the proper City officials charged with the duty of establishing the sewer district had failed to include the property of Tower Grove Park in the district, they were thereby guilty of fraud and oppression, so that the only question to be decided by the Court, sitting as a jury, was whether in view of the evidence adduced at the trial, the defendants had affirmatively proven, **the special tax bill being** *prima facie* **evidence to the contrary**, that the Municipal Assembly of the City of St. Louis in passing the ordinances establishing the district had been guilty of fraud and oppression.

On this issue the Circuit Court, sitting as a jury, found (I have no record before me and must of necessity quote from galley of brief of plaintiffs-in-eror):

> "And the Court further finds that there is no evidence before it to justify the inference that the

such connection with said sewer was accomplished, or by whom.

"I do also find that at the time the work in question was performed it was provided by the Revised Ordinances of the City of St. Louis that water draining from roofs of houses should not flow over sidewalks, but should be conducted through pipes to a sewer, if available, and if not, then such water should be conducted through pipes below the sidewalk, and into the open gutter of the street.

"And the Court does not find from the evidence that it is not possible or feasible to drain the surface water now falling upon or collected from that portion of Tower Grove Park, and the reserved strip of 200 feet, which is higher than and inclined towards Kingshighway, from the surface of said land in any other manner than through or by the district sewer constructed in Kingshighway, or that sewage from houses upon said reserved strip, if any there ever be, cannot be disposed of by means other than said sewer.

Conclusions of Law.

"Finding the facts as aforesaid, **the Court concludes as a matter of law, that it was within the powers of the Municipal Assembly, in the passage of ordinances establishing the sewer district wherein the work sued for was performed, to embrace and designate therein only such real estate as, in its judgment, would be benefited thereby. and that the discretion vested in said Municipal Legislature is not subject to review by this Court, unless the powers of said Legislature were affirmatively shown to have been exercised fraudulently, oppressively or arbitrarily** (Prior v. Construction Co., 170 Mo. 440; Herman v. Schulte, 166 Mo., *l. c.* 416; Herman v. Allen, 156 Mo., *l. c.* 550). And it is further concluded, as a matter of law, from the precedent facts, that the mere omission of lands from said district which might, at one time, be

reasonably included in the sewer district in question, or as to which it is reasonable to assume that the same would be more conveniently served by the sewer in question than any other, does not justify the Court in concluding that the Municipal Assembly, in omitting said lands from the sewer district in question, was actuated by motives of fraud or oppression; or that the *prima facie* liability of defendants (Sec. 25, Art. VI, Charter of City) established by the certified special tax bill is thereby rebutted and overturned."

"District sewers shall be established and constructed or acquired within the limits of districts to be prescribed by ordinance recommended by the Board of Public Improvements, and may be connected with a sewer of any class, or with some natural course of drainage. * * * "

Charter City of St. Louis as amended in 1901, Art. VI, Sec. 21.

This charter provision has the dignity and force of a statute of the state, and therefore this Court will take judicial notice of it.

POINTS.

I.

The special tax bill sued on, re-issued has the *prima facie* proof of validity as if originally so issued.

Galbraith v. Newton, 45 Mo. App. 312;
Vieths v. Planet Co., 64 Mo. App. 207.

II.

The special tax bill in suit is *prima facie* evidence of the liability of appellants as owners to pay the bill.

Article VI, Section 25 of the Charter of St. Louis in force at the time of its issue;
Revised Code of St. Louis, by Woerner.

III.

Under the admissions of the answer, the work was done according to contract and accepted by the city.

IV.

The only issue presented by the answer, then, is, was the passage of the ordinances for the construction of the sewer and for the assessment district the result of fraud, wilful discrimination and intent to oppress the owners of land in the assessment district, by omitting to include Tower Grove Park in the assessment district, and under the rule of decision in this State, there being no evidence or even contention that the plaintiff was in any manner cognizant or privy to said alleged fraudulent action of the city and its officers. Such fact, if true, is no defense to this action. An

objection to any evidence under the answer would have been properly sustained.

Asphalt Paving Co. v. Field, 188 Mo., *l. c.* 206;
Jaicks v. Merrill, 201 Mo. *l. c.* 110, citing Warren v. Paving Co., 115 Mo., *l. c.* 580;
Bank v. Woesten, 147 Mo., *l. c.* 483;
Jennings Land Improvement Co. v. St. Louis, 257 Mo., *l. c.* 305.

V.

In this case there is no allegation of any fact tending to show corruption except the naked fact (alleged) that Tower Grove Park's area could have been drained into this sewer and that a failure to include it in the assessment district is an intentional, wilful fraud on the part of the city and its representatives in the matter of passing the ordinances and fixing the limits of the assessment district.

VI.

In the absence of evidence of fraud, oppression or palpable injustice, the exercise of the discretion confided to the city to pass ordinances establishing sewers and sewer districts is conclusive and not subject to collateral attack.

McGee v. Walsh, 249 Mo., *l. c.* 286;
Heman v. Allen, 156 Mo., *l. c.* 543.

This latter case decides, also at page 543, that if there was connection made with this sewer after the sewer was constructed and tax bill issued, it in no manner affects the validity of the tax bill.

Heman v. Schulte, 166 Mo., *l. c.* 417;
Prior v. Construction Co., 170 Mo., *l. c.* 451.

VII.

An inspection of the Court's findings of facts shows that every constituent fact involved in the controversy, as well as the final constitutive facts of the affirmative defense alleged in the answer, were found by the court with painstaking care. The findings of facts find all material facts in controversy relating to the feasibility of the drainage of the area of Tower Grove Park through the sewer in question, and does find that it was feasible to drain a considerable part of such area through the sewer, but the Court did not find and plainly could not find, that the whole of such area could be so drained, because the habit of water to seek the lower level is obstinate, and thus the area of at least 300 feet by 300 feet, being much lower than Kingshighway, could not be drained into this sewer. And the court does properly find and was bound under the evidence to find, that the evidence did not show that drainage by way of this sewer was the only or exclusive manner of draining the area of the park.

The Court, in its findings, passed upon each and every constitutive fact alleged in the answer as a ground for assailing the validity of the assessment as oppressive or fraudulent. This was a full compliance with the statute, the manifest object of which is that such essential facts are to be found in order that the Appellate Court can determine whether or not the conclusions of law made are warranted by the facts found.

VIII.

The Fourteenth Amendment means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other

classes in the same place and under like circumstances.

Missouri v. Lewis, 101 U. S. 22.

IX.

But it was not designed to interfere with the power of the state to protect the lives, liberty or property of its citizens, nor with the exercise of that power in the adjudication of the courts of the State in administering the process provided by the law of the State.

In re Converse, 137 U. S. 624.

X.

The refusal of the Supreme Court of Missouri to grant a rehearing en banc is not a denial of due process of law when an opinion of a division is adverse to a claim made under the Federal Constitution, but is correct.

State v. Moore, 121 Mo. 514. Affirmed 159 U. S. 675.

ARGUMENT.

I.

The first point made by the plaintiffs-in-error, that the exclusion of the park property from the sewer district, if it was arbitrary, violated the Fourteenth Amendment to the Constitution of the United States, and entitles the plaintiffs-in-error to a reversal of the judgment of the trial Court, asks this Court to pass on the facts in the case from the evidence produced at the trial.

This, we take it, is within the province of the trial Court, sitting as a jury to do, and which we submit the trial Court did do, in a manner approved by the Supreme Court of Missouri, 273 Mo. 184, which fact settles the question.

We take no issue with the plaintiffs-in-error in regard to the many authorities cited under the first point of their argument, to the effect that had the Municipal Assembly of St. Louis been guilty of fraud or oppression, in the establishment of the sewer district in question and in omitting the Tower Grove Park property from the district, they would have cause for complaint.

But the fact is that the Municipal Assembly of St. Louis was not guilty of fraud or oppression in establishing said sewer district and in omitting said Tower Grove Park property, as clearly appears from the evidence in the case, the decision of the trial Judge, sitting as a jury, and from the opinion of the Supreme Court of Missouri.

As said in Fraser v. Mulaney, 129 Wis. 377, *l. c.* 385. cited by plaintiffs-in-error:

"No statutory duty is more imperative than that they (the supervisors of the town) shall honestly exercise the judgment and discretion thus conferred upon them. From the very fact of the granting of such discretion results the opportunity to abuse it. Such opportunity cannot be used to wilfully and dishonestly, through favoritism or animosity, assess or exempt property, and **if it is possible to prove that their final determination was the result of a failure or refusal to exercise judgment, and was reached arbitrarily or fraudulently, then such a departure from their statutory duty is disclosed as must avoid their action.**"

In the present case it was not possible to prove such failure, such arbitrariness or such fraud, as the evidence and the opinions of the courts which tried the issue will show.

II.

Under their second point in their argument plaintiffs-in-error say that the facts found by the trial Court are sufficient to establish that the omissions of the park property was arbitrary.

While we are unwilling to concede that this Court has anything to do with that matter, same having been completely and finally disposed up by the Supreme Court of Missouri, we are willing to point out again mainly for the benefit of plaintiffs-in-error that such is not a fact.

Say the plaintiffs-in-error: "Whether all of the park property, with the exception of the southern 300 feet, drains naturally into Kingshighway, as the trial Court found, or whether all of that property, with the exception of 600 feet, as the Supreme Court of Missouri asserts, drained naturally into Kingshighway, does not seem to us to be material."

Counsel for plaintiffs-in-error, as found by the Supreme Court of Missouri, 273 Mo. *l. c.* 194, seems disposed not to report the evidence in the case correctly. In the part of the findings of fact by the trial Court cited by plaintiffs-in-error, at beginning of second point of their argument, paragraph 1, the Court says:

> "—And the natural drainage thereof is in the main westwardly towards said Kingshighway."

Counsel overlooks the words **in the main**; as he also fails to cite the last paragraph of the finding of fact by the trial Court, in which the Court says:

> **"And the Court does not find from the evidence that it is not possible or feasible to drain the surface water now falling upon or collected from that portion of Tower Grove Park, and the reserved strip of 200 feet, which is higher than and inclined towards Kingshighway, from the surface of said land in any other manner than through or by the district sewer constructed in Kingshighway, or that sewage from houses upon said reserved strip, if any there ever be, cannot be disposed of by means other than said sewer."**

The facts are that there was no evidence in the case tending to show that all parts of the western frontage could not be suitably drained into the sewer in Arsenal street, bounding Tower Grove Park on the south, and there was much substantial evidence to show that a very considerable portion of the western frontage of the park drained naturally towards Arsenal street.

Therefore the facts found by the trial Court and substantiated by the evidence in the case were certainly not sufficient to establish that the omission of the park property was arbitrary, in view especially of the affirmative defense to the *prima facie* evidence of the special tax bill.

III.

As to point number three of their argument plaintiffs-in-error are again mistaken in that the conclusions of law, upon which the trial court based its judgment were erroneous, and are a ground for the reversal of that judgment.

This matter was fully gone into on appeal to the Supreme Court of Missouri; the conclusions of law could not possibly have been other than the trial Judge found with the evidence which was produced at the trial.

The Municipal Assembly, in the passage of ordinances establishing the sewer district had it by law within its power to designate such real estate as in its judgment would be benefited thereby, and that discretion was not subject to review by the trial Court unless the powers of said legislature were affirmatively shown to have been exercised fraudulently, oppressively or arbitrarily.

Prior v. Construction Co., 170 Mo. 440;
Herman v. Schulte, 166 Mo., *l. c.* 416;
Herman v. Allen, 156 Mo. 550.

The trial Court also found as a conclusion of law that the mere omission of park property which might at one time be reasonably included in sewer district in question does not justify the trial Court in concluding as a matter of law that the Municipal Assembly of St. Louis was actuated by fraud or that the *prima facie* liability of defendants established by the special tax bill is thereby rebutted or overturned.

Of course, no other conclusion of law could be reached and as said by the Supreme Court in passing on the question, "the city, in laying out the sewer dis-

tricts, had a right to consider the fact that nearly half the park front drained south and not into Kingshighway and that the other half was park grounds which absorb a large portion of the rainfall, unlike roofs and pavements which discharge all the water into the sewer; it had the right to consider that the park as the dominant tract was under no legal obligation to dispose of its surface water flowing therefrom in its natural direction."

However this may be, it would seem to us that these questions are not to be considered in this court at all, but were all finally disposed of when the Supreme Court of Missouri spoke on the question, and we only go into same because it would appear from the brief of the plaintiffs-in-error that they are disposed to seek a trial of this case *de novo* in the Supreme Court of the United States.

The Fourteenth Amendment means **"that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."**

Missouri v. Lewis, 101. U. S. 22.

But it was not designed to interfere with the power of the State to protect the lives, liberty or property of its citizens, nor with the exercise of that power in the adjudication of the Courts of the State in administering the process provided by the law of the State.

In re Converse, 137 U. S. 624.

IV.

The fourth and last point in argument for the plaintiffs-in-error, to the effect that Division 2 of the Supreme Court of Missouri overruled their motion to

transfer cause to the Court *en banc*, after this division of the Supreme Court had ruled adversely to their claims, we believe is fully disposed by the holding of this Court in the case of **Moore v. State of Missouri,** 159 U. S. 673.

Of course under the constitution of the State of Missouri, Article VI, Section 12, the Supreme Court of the State properly took jurisdiction of this case, as it was alleged in the answer that a federal question was involved, but as said by Chief Justice Fuller of this Court in the Moore case, in passing on the identical question which the plaintiffs-in-error present here, **"the full Court (Missouri Supreme) may have been of the opinion that there was no sufficient ground for the contention that a violation of the Federal Constitution had occurred to require it to hear argument upon that subject. At all events as we find that there was no ground for questioning the judgment of the Supreme Court because of such violation in the legislation on which that judgment was based, or in the conduct of the trial, we cannot hold that the plaintiff-in-error was subjected to an unconstitutional ruling in not being allowed to have his case heard at large by seven judges instead of three."**

With how much greater force do the above words of Chief Justice Fuller apply to the case at issue than to the **Moore** case.

There the construction of a state statute was involved, which, it was claimed, was contrary to the Fourteenth Amendment, because it twice placed a man in jeopardy for the same offense, and deprived him of his liberty without due process of law; in this case no attack whatever is made by the plaintiffs-in-error on any law involved in the case, but the only complaint

is that the trial Court did not render a judgment in favor of the defendants, on evidence which manifestly prevented the Court from so doing.

We submit in all fairness that the plaintiffs-in-error have had a fair trial throughout these lengthy proceedings in the various Courts, and that every right to which they were entitled has unstintingly been given them by the trial Court and by the Missouri Supreme Court in granting them two exhaustive hearings; that the Constitution of the United States has been in no way infringed upon; and lastly that the innocent contractor who performed the services and put out his money in the construction of the sewer in question is justly entitled to be paid for the benefits derived by the plaintiffs-in-error from his efforts in their behalf, and that the writ of error should be dismissed, or the judgment affirmed.

HICKMAN P. RODGERS,

Attorney for Defendant-in-Error.

A. R. & HOWARD TAYLOR,

Of Counsel.

DEC 17 1919
JAMES D. MAHER,
CLERK

IN THE

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Defendant-in-Error.

No. 127.

MOTION TO DISMISS.

HICKMAN P. RODGERS,
Attorney for Defendant-in-Error.

Real Estate Pig. & Pub. Co., St. Louis, Mo. Bell, Olive 1088.

IN THE

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Plaintiffs-in-Error,

v.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY,

Defendant-in-Error.

No. 127.

MOTION TO DISMISS.

Now comes The George G. Prendergast Construction Company, defendant-in-error, in the above entitled cause, by its attorney, Hickman P. Rodgers, and moves the Court to dismiss this case because, according to rule 21, paragraph 5, of this honorable Court, the plaintiffs-in-error are in default in that they have failed to file with the Clerk of this Court, at least three weeks before the case was called for argument thirty copies of a printed brief.

The defendant-in-error further states that on account

of such failure on the part of plaintiffs-in-error, its rights in the premises have been greatly jeopardized, because of its inability to make proper preparation for hearing of this cause before this Court.

That at the time of the writing of this motion, December 8th, 1919, attorney for defendant-in-error has neither been served with brief of plaintiffs-in-error nor with a printed copy of the record in this case, and is in complete ignorance as to points, authorities and arguments to be presented in the case, nor has such brief or printed record been filed with Clerk of this honorable Court.

The defendant-in-error further states that Amos R. Taylor, the attorney who represented The George G. Prendergast Construction Company, the plaintiff in the Circuit Court of the City of St. Louis, and in Supreme Court of the State of Missouri, is now located in the State of California and cannot be communicated with and consulted with, in time to make proper preparation for the hearing before this honorable Court, on account of the default of the plaintiffs-in-error to comply with rule 21 of this court, thereby greatly impeding the proper preparation for trial in this court.

Wherefore, the defendant-in-error respectfully requests that this cause be dismissed as provided for in rule 21, and paragraph 5 of said rule, as it will ever pray.

.....

HICKMAN P. RODGERS,

Attorney for Defendant-in-Error.

FILED
DEC 15 1919
JAMES D. MAHER,
CLERK.

IN THE

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Plaintiffs in Error,

vs.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY,
Defendant in Error.

No. 127.

MEMORANDUM OF PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS FILED BY DEFENDANT IN ERROR.

DAVID GOLDSMITH,
Counsel for Plaintiffs in Error.

St. Louis Law Printing Co., Ninth and Walnut Sts. Bell, Main 1819.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

DAVID GOLDSMITH, REBECCA LOTH, ESTHER I. GOLDSMITH, AMELIA GOLDSMITH and ROSE GOLDSMITH, *Plaintiffs in Error,* vs. THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, *Defendant in Error.*	No. 127.

MEMORANDUM OF PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS FILED BY DEFENDANT IN ERROR.

The plaintiffs in error received very late on December 10th, 1919, a copy of the motion to dismiss above referred to, and now beg to submit the following in opposition:

The brief of the plaintiffs in error herein was

mailed to the clerk of this court on December 10th, 1919, and, if it reaches the clerk in due course of mail and this cause is not called for argument until January, 1920, as plaintiffs in error are advised is likely, this brief will have been filed in ample time under the rules of this court.

Nevertheless, the plaintiffs in error desire to correct representations of fact made in the motion to dismiss, and, since the matter has been brought to the attention of this Court, to explain what has led to their failure to file their brief earlier than has been done.

The motion to dismiss states that the defendant in error is in complete ignorance of the authorities and arguments to be presented in this cause. The fact is that, as will more fully appear hereinafter, galley proof of the statement and argument contained in the said brief of plaintiffs in error was delivered on December 6th, 1919, to Howard Taylor, Esq., attorney for defendant in error, and that this was done pursuant to prior agreement between said Howard Taylor and counsel for the plaintiffs in error.

The said motion sets forth that Amos R. Taylor represented the defendant in error in the State courts, and refers to difficulty in communicating with him in time. The fact is that the defendant in error was represented in the State courts by A. R. & Howard Taylor, a firm composed of Amos R. Taylor and Howard Taylor, both of whom appeared at the trial

of this cause; that said Amos R. Taylor, who is the father of said Howard Taylor, retired from practice on account of ill health more than a year ago, and that said Howard Taylor has since represented the defendant in error, and was the only legal representative of the defendant in error known to counsel for the plaintiff in error between the time of his said father's retirement and the service of said motion to dismiss on December 10th, 1919.

With respect to the delay in printing the record, it will appear from the correspondence hereinafter referred to, that this was due to an attempt at settlement; that said Howard Taylor was informed thereof in advance, the time of the preparation of said motion to dismiss.

And plaintiffs in error, in order to put themselves aright before this Court, further state the following as the cause of whatever delay has occurred in the filing of their brief:

On November 13th, 1919, counsel for plaintiffs in error wrote to the clerk of this court, among other things, as follows:

> "It is my purpose to make another attempt at settlement, and for this reason I would ask you to delay the printing of the record in the case until the latter part of next week, provided ample time for printing is left you and it is convenient to you to take this course. But should there not be time for compliance with this request, then you will, of course, not delay matters."

The clerk of this court replied, under date of November 15th, 1919:

> "I beg to say that it now looks as if the case (mentioning it) would not be reached for argument in the regular call of the docket before the middle of December. I will delay the printing of the record, as requested, until I hear further from you."

On November 15th, 1919, counsel for plaintiffs in error wrote said Howard Taylor, among other things, as follows:

> "On last Thursday I wrote the clerk of the Supreme Court of the United States with regard to the printing of the record in the suit on one of these tax bills, which is now pending in that court, and, in connection therewith, asked the clerk, if practicable, to delay the printing of the record in the case until the latter part of next week, stating that I desired to make one more effort to dispose of the suit by compromise or settlement. (Here follows the offer of settlement.) Please acknowledge receipt of this letter, and let me know by next Wednesday morning whether this offer is acceptable to your client."

The said Howard Taylor did not reply to this letter within the time requested, but did, in the name of A. R. and Howard Taylor, reply by letter of November 18th, 1919, which was received on November 19th, 1919. That reply, however, was not considered def-

inite by counsel for plaintiffs in error, who, thereupon, on the last mentioned date, namely, November 19th, 1919, wrote another letter to counsel for defendant in error, which contains the following:

> "You did not state definitely in your letter of the 18th instant whether your client will accept that offer. Please let me hear from you in regard thereto."

No written reply was made to the latter letter, but, on November 19th or 20th, counsel for plaintiffs in error learned that the offer of settlement would not be accepted. On November 20th, 1919, counsel for plaintiffs in error wrote another letter to said Howard Taylor, which contains the following:

> "Should you desire to endeavor to make a settlement of the suit pending at Washington separately, without detriment to the one pending here, please advise me to that effect at once, since I will drop all efforts at settlement after giving directions to the clerk at Washington to print the record."

Not having received any satisfactory reply, counsel for plaintiffs in error, on November 26th, 1919, wrote the clerk of this court a letter containing the following:

> "I regret to say that I have been unable to effect a compromise of the case. Please, there-